IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

Civil Action No. 1742

RUSSELL V. WARNER AND GEORGE H. TAMBLE, A PARTNERSHIP, DOING BUSINESS AS WARNER AND TAMBLE TRANSPORTATION COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, MISSISSIPPI VALLEY BARGE LINE COMPANY, AND UNION BARGE LINE CORPORATION, APPELLEES

MOTION TO AFFIRM

Appellees, United States of America, and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree entered on October 4, 1950, by a district

court of three judges specifically constituted pursuant to 28 U. S. C. §§ 2284 and 2325, dismissing appellants' complaint which sought to set aside an order made by the Interstate Commerce Commission on May 17, 1949, as amended. Appeal was allowed on December 1, 1950, and appeal papers were served on December 4, 1950.

Following the enactment of Part III of the Interstate Commerce Act (49 U. S. C. §§ 901-923) in September of 1940, the appellants filed with the Interstate Commerce Commission two applications seeking certain authorizations respecting the scope of their water carrier operations on certain parts of the inland waterways system of the country. The first of these applications sought a declaration by the Commission that pursuant to Section 303(e) of the Interstate Commerce Act [49 U. S. C. § 903(e)(2)] [1] the appellants' transportation serv-

[1] Section 303(e)(2) reads in part:

> It is declared to be the policy of Congress to exclude from the provisions of this chapter, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this chapter or chapters 1 or 8 of this title. Upon application of a carrier, made in such manner and form as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this chapter such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared. . . .

ice by water on the Mississippi River and its tributaries of logs and contractors' equipment [2] was not subject to the Act. The subsequently filed second application sought a permit for a contract carrier by water operation under the so-called grandfather clause of Section 309(f) of the Act [49 U. S. C. § 909(f)] [3] It was claimed in this application that by virtue of engaging in the bona fide transportation of commodities generally by non-self-propelled vessels with the use of separate

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[2] Described by Division 4 of the Commission July 7, 1947 (*Warner & Tamble Contract Carrier Application*, 265 I. C. C. 147, 150):

> This equipment consists of mixed lots of earth-moving equipment such as draglines and tower machines which sometimes weigh as much as 600 tons each, caterpillar tractors, bulldozers, euclid trucks, dump trucks, scrapers, motor patrols, greasing and repair equipment, and camp equipment, such as small sheds and houses on skids. . . .

[3] Section 309(f) reads in part:

> Except as otherwise provided in this section and section 311, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation: Provided, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. . . .

towing vessels, and by towing vessels in the performance of general towage, on the Mississippi River and its tributaries, and the furnishing of self-propelled and non-self-propelled vessels under charter, lease or other agreement to persons for the transportation of their own property, the appellants were entitled to a permit authorizing the continuation of such contract carrier service for the future. In the alternative, a certificate as a common carrier was sought if that should be deemed appropriate.

Following extensive proceedings before the Commission,[4] it issued an order and permit granting appellants certain operating rights as a contract carrier by water, under the grandfather clause of Section 309(f), to charter non-self-propelled vessels to persons other than carriers, to engage in towing services, and to transport forest products by barge and tugboat. The Commission exempted from regulation in accordance with Sections 302(e), 303(d) and 303(e) of the Act the transportation of contractors' equipment, materials and supplies incidental to and used with such equipment in construction work on the Mississippi River and its tributaries and at places along such water-

[4] In the course of these hearings there were 442 pages of testimony and 39 exhibits introduced, three proposed reports issued to which exceptions and replies were filed, several sets of briefs filed, two oral arguments before Division 4 of the Commission, and three final reports and orders issued, together with a final Commission order denying reconsideration of Division 4's final order.

ways, as well as the transportation services for other carriers and the transportation of gasoline in certified tank vessels. Further operating rights sought by appellants were denied by the Commission, either because of failure to prove bona fide operation in the crucial period, or because no authority was needed under the Act to continue the operations.

The entire Commission denied a petition for reconsideration of these final conclusions, and the amended permit and order went into effect on the postponed date of February 10, 1950. Upon review of the proceedings and conclusions of the Commission, together with the record made before the Commission, the District Court in a *per curiam* opinion found that the Commission "made essential basic findings of fact, supported by substantial evidence; and that the order of the Commission is in all things lawful." On October 6, 1950, the District Court adopted detailed findings of fact and conclusions of law, a copy of which is annexed to this Motion as Appendix A.

The exemption from regulation of contractors' equipment was made at the request of the appellants, and has its basis in Section 303(e) of the Act. The Commission found, among other things, that the appellants were specialists in the transportation of contractors' equipment, that special barge equipment was used by them in this service, that because of its inherent nature this transporta-

tion service was not actually and substantially in competition with common carriers subject to Parts I, II or III of the Act, and that the operation was that of a contract carrier by water. *Warner & Tamble Contract Carrier Application,* 265 I. C. C. 147, 151; 265 I. C. C. 543, 551. As a consequence, this much of the appellants' operation has been exempted from the requirements of the Interstate Commerce Act in accordance with the plain dictates of the statute.

First: The District Court found that the evidence supported the findings that there was not a sufficient showing to support the appellants' claim of bona fide transportation of commodities generally by water. While the separate commodities moved at various times between 1932 and 1948 by the appellants numbered approximately 14, there was a lack of evidence to support a permit founded on the transportation of general commodities. The transportation of the bulk of the commodities claimed in support of general commodity service (contractors' equipment and gasoline in certified vessels) were exempted movements.

While the transportation of exempt commodities may be considered in support of a claim of bona fide transportation of general commodities, grandfather authority may not be granted on the strength of the evidence of exempt transportation in the presence of a fatal weakness in the proof of bona fide service of the non-exempt type. The

purpose of considering the exempt operations at all in this connection is to aid in the fair appraisal of the entire operation, but if a permit were to issue on the strength of the exempted operations the policy of Congress to provide exemptions from regulation would be defeated. See *Barrett Line* v. *United States, supra,* 326 U. S. at page 193; *Waterways Transp., Inc.* v. *United States,* 83 F. Supp. 588, 593; *Inland Nav. Co.* v. *United States,* 76 F. Supp. 567; *Central Barge Co. Application,* 260 I. C. C. 329, 335; *Ohio River Company Contract Carrier Application,* 260 I. C. C. 501, 508. And in the *Barrett* case this Court held that a water carrier could not successfully found its claim to grandfather rights of a general commodity transporter upon his chartering operations.

The commodities which appellants had transported, other than those exempted, were either transported in towing operations or the transportation was so sporadic and lacking in substantiality, even after making allowance for the special characteristics of water carrier operation, that the requested finding of past bona fide transportation of general commodities could not be made. Thus, of the 587 bargeloads of traffic shown to have been transported by the appellants, over a 16-year period, 370 were of logs, for which a permit was issued. Of the remaining 217 bargeloads, 151 were of contractors' equipment and 10 of gasoline and petroleum products, for which, as already stated,

no authority is required by the Act. This leaves 56 bargeloads of which 19 were derricks and dredges, being floating objects that were towed and not freighted, exempted from regulation pursuant to *Towage of Floating Objects,* Ex Parte No. 147 on the Commission's docket, (see 250 I. C. C. 525). The remaining 37 bargeloads of rice, cattle, lumber, and the like, comprise six commodities, as to which the Commission found that the movements over the 16-year period were sporadic and unsubstantial. To find from this showing that there had been bona fide contract carrier service on January 1, 1940, and continuously thereafter, would be an irrational finding, contrary to the rule established by this Court requiring proof of actual and substantial service as support for the issuance of operating authority under a grandfather clause. *McDonald* v. *Thompson,* 305 U. S. 263, 266; *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 480-481; *Barrett Line* v. *United States,* 326 U. S. 179, 198. Therefore, to find that the appellants are entitled to general commodity authority would not only be contrary to the evidence, but would be entirely contrary to the purpose of the grandfather clause to preserve the substantial parity between future operations and past bona fide operations. *Alton R. Co.* v. *United States,* 315 U. S. 15, 22.

In determining whether the evidence submitted supported the appellants' claim of bona fide opera-

tion on the crucial date and continuously since, it was necessary for the Commission to examine that evidence, to analyze it, and to classify it according to the various segments of operating authority sought. Also, the dates represented by any such evidence could not be ignored for the very rights conferred by the grandfather proviso turn upon calendar dates, and it was necessary to analyze the commodities claimed in order to determine whether they represented classes sufficient to reasonably convince that general commodities had in fact been transported in the crucial period in sufficient volume to warrant a finding of bona fide transportation. The over-refinements condemned in *United States* v. *Carolina Freight Carriers Corp., supra,* were not indulged. Instead, the classification was of the type customarily pursued in this type of case and not condemned in the *Barrett* case. All water carriers do not perform the same services, a condition recognized in the statute. It is the Commission's task to find whether the carrier fits one of the numerous statutory or discretionary exemptions, as well as to find the scope of its past bona fide operations of the regulated type. While in such a case views might differ as to the final judgment, the Commission is specially informed in these matters, and its judgment and discretion are controlling, save in case of clear departure from the statute. *Barrett Line* v. *United States, supra,* 326 U. S. at page 199; *United States* v. *Carolina*

Freight Carriers Corp., supra, 315 U. S. at page 492.

Second: The towage operations claimed by the appellants were limited territorially by the Commission. This was necessary because there was insufficient evidence of towage for non-carriers to support the issuance of a permit for broader authority, and because the Act [Section 303(f)] barred towage service performed for other carriers. Section 303(f) of the Act provides in part:

> Notwithstanding any provision of this section or of section 302, the provisions of this part shall not apply—
>
> * * * * *
>
> (2) to transportation by water by any person . . . for . . . a water carrier subject to this chapter, . . . in the performance of floatage, car ferry, lighterage, or towage; but such transportation shall be considered to be performed by such carrier . . . as part of, and shall be regulated in the same manner as, the transportation by . . . water to which such services are incidental.

The Division found at 265 I. C. C. page 548:

> A review of the evidence including that adduced at the further hearing indicates that applicants' towing operations along the Ohio River below and including Paducah were of some frequency, but above Paducah no services are shown except one movement prior to

1938 and none thereafter except for other carriers. Along the Illinois Waterway five towing movements are shown prior to 1938. However, no towing services except for other water carriers are shown thereafter. Along the Mississippi River above Cairo some frequency of service is shown in the period prior to 1939. In 1939 a towing service was rendered in connection with a bargeload of piling from Cairo to Cape Girardeau, but no services are shown thereafter except those performed for other water carriers. . . .

. . . we conclude, that applicants' general towage service on and since the critical period extended up the Ohio River to and including Paducah, in addition to the operations previously authorized. With respect to the Ohio River above Paducah, the Illinois Waterway and the Mississippi River above Cairo, it appears that applicants have performed only occasional towage services for shippers prior to and including 1938, and none thereafter, except an occasional movement of contractors' equipment and a single shipment of piling; as to these waterways, applicants' towage operations were not of such substantiality as to support their claim of "grandfather" rights thereon. Their services for other carriers, or in connection with movements of contractors' equipment, may be performed without authority from us . . .

In reaching these conclusions, the Commission considered all incidents of towage relied upon by

appellants. Clearly the District Court was correct in concluding that adequate findings had been made, and that the evidence supported those findings. Compare, *United States* v. *N. E. Rosenblum Truck Lines, Inc.*, 315 U. S. 50.

Third: While chartering is a contract carrier service, as defined by Section 302(e),[5] the Act does not define the term chartering. In *Barrett Line Inc., Contract Carrier Application,* 265 I. C. C. 361, 368, decided after this Court's decision in the *Barrett* case, the Commission defined the term and repeated the definition in its final report in the case at bar (265 I. C. C. at page 545):

> (1) The term "charter" as used in the second sentence of section 302 (e) embraces demise charters, only, and does not embrace affreightment charters.
>
> (2) The question whether a particular charter is a demise or an affreightment charter is one of fact, to be determined upon consideration of all the pertinent circumstances and conditions.
>
> (3) If the charter covers a self-propelled vessel . . . the determination whether it is a demise or an affreightment turns on the

[5] Section 302(e) reads in part as follows: ". . . The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this chapter and chapters 1 and 8 of this title, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'."

> question whether the owner yields or retains possession, command, and navigation of the vessel. In determining this question, the circumstance ordinarily of greatest significance relates to the master and crew. If they are appointed and paid by the owner, the charter ordinarily will be construed as one of affreightment, on the theory that through his master and crew, the owner retains possession and control of the vessel, even though directions on which the vessel shall proceed are given by the charterer . . . However, the fact that the master and crew of the vessel are in the employ of the applicant while of peculiar significance, is not in and of itself conclusive, and will yield to evidence of intention to surrender possession and control to the charterer.

The appellants here sought a permit covering charter operations of both self-propelled and non-self-propelled vessels based upon a claim of bona fide operations on the crucial date. But from the evidence the Commission found that the principal charter operations, as defined above, were of only non-self-propelled vessels, and that self-propelled vessels were not chartered with that degree of substantiality required by this Court's decision in the *Carolina* case for there were only four instances of chartering on a bareboat basis during the entire period beginning with April 1935. As to certain of the proof offered in support of chartering, the Commission considered the transportation to have

been a towing service, for which it issued a permit, because the appellants at all times had full control of the furnishing, supplying, manning, operating and insuring the vessels, and the shipper paid for the service on an hourly rate.

Another type of claimed chartering service was the furnishing of vessels to other carriers, a service not embodied within the definition of contract carrier provided in Section 302(e). Not being a service subject to regulation, the evidence would not be employed to support a claim to a permit as a regulated service.

The Division found that 168 charters were claimed during the period. Twenty were charters of non-self-propelled vessels, which transportation service is authorized by the Commission's permit. Of the remaining 148 charters, 62 were the furnishing of vessels to other carriers, as to which the Act does not authorize the issuance of a permit; 82 were the alleged charters to the Corps of Engineers of the United States Army, which the Commission found to be towing operations and granted authority therefor under the towage portion of the permit; and four were charters of tugboats, obviously not constituting the substantial chartering of self-propelled vessels which would support the granting of grandfather rights for such service.

Fourth: The appellants assert that error was committed in not granting sufficient weight to their

holding out to perform general commodity and other services beyond those authorized by the Commission. But the mere holding out without more is an insufficient predicate to support the grant of a claim of bona fide operation. *United States* v. *Carolina Freight Carriers Corp., supra,* 315 U. S. at pp. 480-481. If the broad sweep of the proof does not show a bona fide service the grandfather exemption becomes inapplicable.

The record before the Commission, and the three reports by Division 4,[6] make it clear that the appellants' water carrier operations were considered as a whole in the light of all probative evidence, that adequate findings of fact were made, that there was substantial evidence to support such findings, and that the conclusions reached maintain a substantial parity between past bona fide operations and those authorized for the future. There is therefore no substantial question presented for the determination of this Court.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

DANIEL M. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

DECEMBER 1950.

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[6] *Warner & Tamble Transp. Co.—Exemption Section 303(e),* 250 I. C. C. 803; *Warner & Tamble Contract Carrier Application,* 265 I.C.C. 147; 265 I.C.C. 543.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

Filed: October 7, 1950

Civil Action No. 1742

RUSSELL V. WARNER AND GEORGE H. TAMBLE, A PARTNERSHIP, DOING BUSINESS AS WARNER AND TAMBLE TRANSPORTATION COMPANY, PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above styled case came on to be heard before a statutory three-judge United States District Court composed of the Honorable John D. Martin, Circuit Judge, Honorable Leslie R. Darr and Honorable Marion S. Boyd, District Judges, on July 6, 1950, and the Court now makes these findings of fact and conclusions of law.

Findings of Fact

1. The plaintiffs, Russell V. Warner and George H. Tamble, are co-partners doing business as Warner and Tamble Transportation Company of Memphis, Tennessee.

2. The defendants are the United States of America, the Interstate Commerce Commission, and the intervening defendants are the American Barge Line Company, the Mississippi Valley

Barge Line Company, and the Union Barge Line Corporation.

3. On December 30, 1940, the plaintiffs filed with the Interstate Commerce Commission an application seeking a declaration that that portion of their water carrier business consisting of the transportation of forest products and contractors' equipment was exempt from regulation by that Commission pursuant to Section 303(e) of the Interstate Commerce Act.

4. On May 9, 1942 Division 4 of the Interstate Commerce Commission, following a hearing on June 2, 1941, made a report accompanied by an order granting the above application as to contractors' equipment but denying the application as to forest products. *Warner & Tamble Transportation Co.—Exemption section 303(e),* 250 ICC 803.

5. On May 28, 1941 the plaintiffs filed a second application with the Commission seeking in the alternative a permit or a certificate of public convenience and necessity authorizing the continuance in the future under Section 309(e) or 309(f) of the Interstate Commerce Act of water carrier operations of general commodities on the Mississippi river and its tributaries.

6. A proposed report was issued by the Commission's Bureau of Water Carriers on August 30, 1945, followed by the filing of exceptions and the holding of a public hearing on May 22-23, 1946. A second proposed report was issued on December 10, 1946, oral argument was heard by Division 4 of the Commission on April 10, 1947, and on July 7, 1947, Division 4 issued a report and order authoriz-

ing issuance of a permit under Section 309(f) of the Interstate Commerce Act for part of the claimed operations, confirming the previously issued exemption for part of the operations, and denying the remainder of the application. *Warner & Tamble Contract Carrier Application,* 265 ICC 147.

7. Following the plaintiffs' petition for reconsideration, further public hearings were held by an examiner on April 29-30, 1948, a proposed report issued on October 20, 1948, oral argument was heard by Division 4 on March 30, 1949 and a report accompanied by an order and permit was issued on May 17, 1949. *Warner & Tamble Contract Carrier Application,* 265 ICC 543.

8. On December 5, 1949 the entire Commission denied the plaintiffs' petition for reconsideration.

9. The ultimate findings made or affirmed by Division 4 in its report of May 17, 1949, and affirmed by the entire Commission, are that:

a. The plaintiffs' transportation business is that of a contract carrier by water as defined in Section 302(e) of the Interstate Commerce Act;

b. The plaintiffs' evidence of past bona fide operations requires the issuance to them of a permit for future operations as a contract carrier by water under Section 309(f) of the Interstate Commerce Act to charter non-self-propelled vessels to persons other than carriers at Memphis, Tennessee; to engage in towing service between points on the Mississippi River and its tributaries, including the Ohio River as far as Paducah, Kentucky, but excluding the Gulf Intracoastal Waterway; to

transport by barge and tugboat forest products on the Mississippi River and its tributaries below and including Cairo, Illinois, but not on the Ohio River or the Gulf Intracoastal Waterway;

c. The plaintiffs' transportation by water of contractors' equipment, materials and supplies incidental to and used with such equipment in construction work on the Mississippi River and its tributaries, and at places along such waterways, is exempt from the regulatory provisions of the statute in accordance with section 303(e) of the Interstate Commerce Act;

d. The plaintiffs' transportation services by water for other carriers and of gasoline in certified tank vessels is exempt from the regulatory provisions of the Interstate Commerce Act;

e. The plaintiffs' evidence of past bona fide operations did not entitle them to a permit to transport general commodities by water in a freighting operation; to transport forest products on the Mississippi River or its tributaries above Cairo, Illinois, or on the Ohio River or the Gulf Intracoastal Waterway; to engage in towing service on the Ohio River above Paducah, Kentucky, or on the Gulf Intracoastal Waterway; or to charter self-propelled vessels.

10. On February 9, 1950 the plaintiffs filed with this Court a complaint, naming the United States of America and the Interstate Commerce Commission as defendants, alleging that the Commission's action was arbitrary, capricious, based on a wrong interpretation of the Interstate Commerce Act, and that the findings made were contrary to,

against the weight of, and without support in the evidence as to:

a. The restriction on the plaintiffs' future freighting operations as a contract carrier as to territory and commodities;

b. The restriction on plaintiffs' future towing operations as a contract carrier;

c. The restriction on plaintiffs' future chartering operations as a contract carrier; and

d. The exemption of certain services from regulation in lieu of subjecting them to such regulation and issuing a permit therefor.

11. The complaint prayed for a temporary restraining order to restrain the enforcement of the Commission's final order and permit; for a judgment annulling and setting aside of such order and permit; that this Court direct the Commission to review plaintiffs' application and to interpret the law so as to result in the issuance of a permit authorizing plaintiffs to engage in the transportation as a contract carrier by water of general commodities on the rivers claimed; and for other relief.

12. On April 3, 1950 the American Barge Line Company, the Mississippi Valley Barge Line Company, and the Union Barge Line Corporation, water carriers who are competitors of the plaintiffs, were permitted by the Court to intervene as parties-defendant.

13. All defendants thereafter answered, denying generally the material portions of the complaint.

14. The statutory three-judge court was convened pursuant to Title 28 United States Code, Section 2284 and Section 2325.

15. The Court heard the oral arguments of counsel for the plaintiffs, the United States of America, the Interstate Commerce Commission, and the intervening defendants on July 6, 1950, and briefs were filed by all parties. The entire record made before the Commission was introduced in evidence before the Court.

16. The reports of Division 4 of the Interstate Commerce Commission upon which the permit and the order of exemption are based contain the essential basic findings of fact.

17. The findings of fact made by Division 4 of the Interstate Commerce Commission and affirmed by the entire Commission are supported by substantial evidence, and are adopted by the Court.

Conclusions of Law

1. The amended permit and order made by Division 4 is neither arbitrary nor capricious but in all respects was made in accordance with law.

2. The determination of the scope of a permit issued under Section 309(f) of the Interstate Commerce Act has been conferred upon the Interstate Commerce Commission and its determination is final unless not based upon substantial evidence or is arbitrary or capricious, or is not made in accordance with the Interstate Commerce Act or other applicable statutes.

3. The plaintiffs have the burden of proving to the Interstate Commerce Commission that they

are entitled to a permit under Section 309(f) of the Interstate Commerce Act.

4. The Commission is empowered to weigh the evidence and the Court will not substitute its judgment for that of the Commission.

5. The Commission properly construed the statute by denying under Section 309(f) those claims to operating authority for which substantial evidence was not submitted as to past bona fide operations.

6. The Commission properly construed Section 303(e) by exempting from regulation the plaintiffs' transportation services in the transportation of contractors' equipment, materials and supplies for the Commission properly found that such transportation met the conditions of the congressional policy of exemption declared in Section 303 (e).

7. The Commission properly applied the statute in denying plaintiffs authority to engage in the transportation of general commodities in a freighting operation based upon the evidence of exempt transportation in the absence of substantial evidence of past bona fide transportation of non-exempt commodities in a freighting operation.

8. The Complaint should be dismissed.

/s/ JOHN D. MARTIN,
Circuit Judge.

/s/ LESLIE R. DARR,
District Judge.

/s/ MARION S. BOYD,
District Judge.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 641

RUSSELL V. WARNER AND GEORGE H. TAMBLE, A PARTNERSHIP DOING BUSINESS AS WARNER AND TAMBLE TRANSPORTATION COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

INTERVENOR'S MOTION TO AFFIRM

LUCIUS E. BURCH, JR.,
HARRY C. AMES,
Counsel for Intervenors.

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IN THE DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil Action No. 1742

RUSSELL V. WARNER AND GEORGE H. TAMBLE, A PARTNERSHIP DOING BUSINESS AS WARNER AND TAMBLE TRANSPORTATION COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,

Appellees

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3 of the revised Rules of the Supreme Court of the United States, American Barge Line Company, Mississippi Valley Barge Line Company, and Union Barge Line Corporation, intervening defendants in the above-entitled cause, move that the judgment and decree of the District Court be affirmed.

Statement

For a statement of the case, including the proceedings before the Interstate Commerce Commission and the Court below, and to avoid unnecessary duplication, these movants refer to, reply upon, and adopt as their own that portion

of the motion of the United States and the Interstate Commerce Commission dealing with those subjects.

The Appeal Presents No Substantial Questions

Reduced to concrete form the substantial questions alleged to be presented by this appeal are:

1. Whether the Commission is authorized to substitute a temporary exemption certificate for a permit to which an applicant is entitled as a matter of right;
2. Whether evidence of exempt transportation, as well as of intrastate transportation may be entirely excluded from consideration in determining "grandfather" rights;
3. Whether in determining "grandfather" rights the Commission may "atomize, molecularize and pulverize" evidence of the carriers' previous operations as to time, territory and commodities.
4. Whether the Commission in a "grandfather" proceeding may lawfully freeze the carriers' future operations into the precise pattern of former operations, and
5. Whether the Commission is required as a matter of law to grant operating authority under the "grandfather" clause which will preserve a substantial parity with prior bona fide operations.
6. Whether the Commission may lawfully limit the grant of authority to transport general commodities to common carriers, as distinguished from contract carriers.

(See page 4 of Statement of Jurisdiction).

We show below that the appeal presents no substantial question as to any of these matters.

1. *The Commission Has Made No Unlawful Substitution of a Certificate of Exemption For a Permit*

In Section 303, Part III of the Interstate Commerce Act (U. S. Code Title 49, Section 903) in which certain classes

or types of transportation are exempted from regulation it is provided, inter alia in paragraph (e) that:

> It is hereby declared to be the policy of Congress to exclude from the provisions of this part, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment, or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this part or part I or part II. Upon application of a carrier, made in such manner and form as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this part such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared.

Pursuant to such provisions appellants herein filed with the Commission, on December 30, 1940, an application asking for a certificate of exemption to cover the transportation of a description of traffic styled by them as "contractors' equipment."[1] They also filed on May 28, 1941, an application under Section 309 of said act for authority to continue operations "as a contract carrier by water, by non-self-propelled vessels with the use of separate towing vessels, in the transportation of commodities generally, and by towing vessels in the performance of general towage, on the Mississippi River and its tributaries; also in the furnishing of vessels (under charter, lease or other agreement) to persons for the transportation of their own property."

On May 9, 1942, the Commission issued an order based

[1] This description is well known in the water carrier industry and embraces equipment, materials and supplies used by contractors in dredging, levee work, and the like.

upon the application for exemption in which it exempted from the provisions of the act and from regulation thereunder, the

> transportation of contractor's equipment used in making levees or digging cut-offs between points on the Mississippi River and its tributaries.

The first official action on the application of May 28, 1941, for a permit came in August, 1945,[2] in the shape of a proposed report by the Commission's Bureau of Water Carriers and Freight Forwarders, which was based upon a field investigation by representatives of that Bureau. In that proposed report the Bureau made the following recommendations:

> 1. That the operations of appellants be found to be those of a common carrier, rather than a contract carrier.
>
> 2. That territorial rights be limited to the Mississippi River, between Cape Girardeau, Mo., and the mouth of the Red River, and on the White River below Clarendon, Ark., and the Arkansas River, below Pine Bluff, Ark., and
>
> 3. That the application in all other respects (including the application to furnish vessels to shippers) be denied.

Lengthy exceptions to this proposed report were filed by applicant on October 19, 1945, and the Commission was asked to assign the case for formal hearing in order to give applicants a better opportunity to prove their services and the details thereof. With respect to the matter of the

---

[2] In the more than three years intervening appellants had taken no further steps in connection with the Commission's order of exemption of May 9, 1942.

exemption theretofore granted in connection with the transportation of "contractors' equipment" appellants stated:

> Oral proof will develop that these shipments were not confined to the machinery which is used in making levees and digging cut-offs, but consisted of general commodities, such as automobiles, household goods, electrical equipment, pigs, horses and many other commodities too numerous to mention here. Applicant, in its exhibits, probably should have described these shipments more in detail, but it did not have a record of what was on the barges, at the time the exhibits were prepared, and was of necessity forced to describe them as contractors' equipment. At the hearing applicant can and will produce the shippers who will testify as to what the barges contained, and in addition, applicant will show that those shipments were movements of machinery which was to be used for purposes other than building levees.

On the strength of these representations the Commission granted appellants a formal hearing[3] at which they were given full opportunity to sustain their contentions. It also, at appellants' specific request, reopened the original proceeding which had to do only with the certificate of exemption. Such hearing was had on May 22 and 23, 1946, following which the hearing examiner issued a proposed report to which exceptions and replies thereto were filed and oral argument had.

In its report dated July 7, 1947, in *Warner and Tamble Contract Carrier Application*, 265 I. C. C. 147, the Commission found:

> 1. That applicant was a contract carrier.
> 2. That it was entitled, as such, to a *freighting* permit for the transportation of forest products, and to
> 3. a *towing* permit covering general towage (which would include commodities generally),

[3] As a matter of fact, it granted still another hearing at a later date.

4. On the Mississippi River and its tributaries (not including the Ohio River or the Gulf Intracoastal Waterway) below and including Memphis, Tenn., and to a permit covering the

5. chartering of non-self-propelled barges at Memphis, Tenn.

With respect to the certificate of exemption issued on May 9, 1942, the Commission amended its order so as to embrace:

> Contractors' equipment used in construction work on the Mississippi River and its tributaries, and at points along such waterways,

thereby considerably broadening the original words of limitation which read:

> used in making levees or digging cut-offs.

Still dissatisfied, appellants again petitioned for reconsideration and rehearing, which was granted, and in its final report on further hearing, dated May 17, 1949, in *Warner and Tamble Contract Carrier Application*, 265 I. C. C. 543, the Commission again liberalized and enlarged the description of "contractors' equipment" so as to "include *materials and supplies* used by contractors in construction work etc." Before stating its conclusions in this respect the Commission said, at page 551:

> By the prior order herein, of July 7, 1947, applicants' transportation of contractors' equipment used in construction work on the Mississippi River and its tributaries, and at points along such waterways, was exempted from the provisions of part III of the act until further order of the Commission. Applicants contend that this commodity description is not sufficiently broad. They ask that the order be modified so as to include contractors' equipment, and materials and supplies incidental to and used with contractors' equipment. Protestants offer no objection to the proposed description.

It appears that materials and supplies used by contractors in construction and repair work along the Mississippi River and its tributaries are not readily transported by commmon carriers by rail, truck, or water, and that the transportation thereof by applicants is not substantially competitive with transportation by any other common carrier subject to the act.

The order of exemption will be modified to include materials and supplies incidental to and used with contractors' equipment.

It is argued that the Commission must issue a permit authorizing applicants to transport contractors' equipment before it can exempt such transportation. *This, in effect, is to say that we must first set up a straw man, then knock him down.* The argument is without merit. *It was upon applicants' initiative that the exemption was granted by us.* The procedure now advocated by them is not recognized by the statute. (Emphasis ours)

We have dealt with these procedural steps *in extenso* in order to show that the Commission has not, as alleged, forced upon appellants a certificate of exemption in lieu of an operating permit, as alleged. What the Commission has done, and all that it has done is to find from the evidence adduced by appellants that (a) shipments billed as "contractors' equipment" were in fact "contractors' equipment," and (b) properly subject to exemption under Section 303(e) by reason of being "not actually and substantially competitive with transportation by any common carrier subject to this part (part III) or part I or part II." This is a function which the Commission is empowered to perform under the statute and, if based on substantial evidence, is not subject to judicial review. *Interstate Com. Comm.* v. *Union Pac. R. Co.*, 222 U. S. 514; *Virginian R. Co.* v. *United States*, 272 U. S. 658, 665, 666; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 481, 482;

Barrett Lines, Inc. v. *United States*, 326 U. S. 179, 199, 200.

What appellants are contending simply comes to this: The Commission should have drawn upon the generic description "contractors' equipment"[4] for enough individual commodities to grant a permit for the transportation of general commodities, but to retain the description as the premise for a certificate of exemption. In other words, appellants would "have their cake and eat it too."

2. *The Commission Is Under No Duty to and in Fact Would Contravene The Statute If It Granted Operating Rights On The Strength of Exempt Transportation.*

When Congress in 1940 brought water carriers under regulation in part III of the Interstate Commerce Act (U. S. Code, Title 49) it specifically provided in Section 303, paragraphs (b) to (j), inclusive, that certain types of transportation should be exempted from regulation. And except where the context necessitated different phraseology, each of such paragraphs was preceded by the specific words:

> Nothing in this part shall apply to (defining the transportation or service).

We have already adverted at length to the commodity description—"contractors' equipment"—which the Commission has exempted under paragraph (e) of Section 303, as not being competitive with transportation performed by common carriers by water, rail, or motor truck. Other types of exempted transportation or services which are pertinent here are (a) the haulage of commodities in bulk, (b) towage services performed as the agent of another carrier, or (c) services wholly within a state. The bulk exemption for general application is found in Section 303(b)

[4] Which conceivably could consist of all the household effects of the captain and his family.

(U. S. Code, Title 49, section 903(b)) which provides as follows:

> (b) Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purpose of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended

Liquid commodities in bulk are subject to a further exemption in paragraph (d) Section 303 (U. S. Code, Title 49, Section 903(d)) which reads:

> (d) Nothing in this part shall apply to the transportation by water of liquid cargoes in bulk in tank vessels designed for use exclusively in such service and certified under regulations approved by the Secretary of Commerce pursuant to the provisions of section 4417a of the Revised Statutes.

The exemption covering the performance of towage services as the agent of another carrier is found in paragraph (f) of Section 303 (U. S. Code, Title 903 (f)) which paraphrased, reads as follows:

> Notwithstanding any provision of this section or of Section 302, the provisions of this part shall not apply

* * * * * * *

> (2) to transportation by water by any person * * * *for* a water carrier subject to this part, in the performance of * * * towage; but such transportation shall be considered to be performed *by* such carrier * * * as part of and shall be regulated in the same manner as, the transportation by * * * water to which such services are incidental. (Emphasis added).

The exemption as to intrastate transportation is in paragraph (j) of Section 303.

Obviously, under such provisions, if it should develop that an applicant for operating rights had performed during the critical period nothing save transportation or services which were specifically exempted from regulation the Commission would not only be without power to grant such rights but would be performing a vain act in doing so. Such a situation was presented in *Union Sand & Gravel Co., Applications,* 250 I.C.C. 141. In that case it appeared that applicant's "principal business (was) the production of sand and gravel, and in that connection its vessels (were) used in dredging and transporting these commodities." At page 142, the Commisison said:

> We find that applicant's operations * * * are not subject to part III of the act, by reason of the exemption in section 303 (b) thereof, and the applications should be dismissed.

The Commission has taken similar action in those cases where virtually all of an applicant's operations during the critical period were of an exempt character and only an insignificant portion of them were of a nature subject to regulation. Such a case was *Upper Mississippi Towing Corp. Appln.,* 260 I.C.C. 292, 293, in which the Commission stated:

> The purpose of the "grandfather" clause was to assure those to whom Congress had extended its bene-

> fits a substantial parity between future operations and prior bona fide operations. *Alton R. Co.* v. *United States,* 315 U. S. 15. With this guide before it, the division (Div. 4) *might have found* that applicant was a common carrier of liquid cargoes in bulk, in tank vessels, and as a tower in the performance of towage for other carriers subject to Part III. That would have availed applicant nothing, however, *as no certificate could be issued* to authorize such activities because the provisions of Part III do not apply to transportation services of those types by reason of the exemptions in section 303(b), (d), and (f)(2). (Emphasis ours)

Such action was entirely in harmony with the decision in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, in which the Court, construing the "grandfather" clause [5] in part II of the act had this to say (pages 480, 481) concerning the expression "bona fide operation":

> The Act provides the test of "bona fide operation." That standard carries the connotation of substantiality. (Then follows citation and quotation from *McDonald* v. *Thompson, supra.*) Substantial, as distinguished from incidental, infrequent, and sporadic service is required. • • • Furthermore, the *characteristics* of the transportation service are relevant to the territorial scope of the operations which the Commission may authorize. (Emphasis and parentheses ours).

In connection with this point appellants lean heavily upon the decision of the Commission in *Russell Bros. Towing Corp. Application,* 250 I.C.C. 429. In that case the Commission held, and properly so, that where an applicant

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[5] This clause raises a conclusive presumption of "public convenience and necessity" in the case of a common carrier applicant, or "consistency with the public interest," in the case of a contract carrier applicant, if there was a *bona fide* operation on January 1, 1940, which has persisted since except for interruptions beyond an applicant's control. (Section 309, U. S. Code, Title 909).

for operating authority has performed a substantial amount of *both* exempt and non-exempt transportation it is appropriate to take into account its entire operations in order to determine territorial rights. The case has no application in those situations where only an infinitesimal portion of the past operations was of a non-exempt character. In *Card Towing Line Application*, 250 I.C.C. 621, 626, for example, the Commission stated:

> We have heretofore authorized general towing operations upon a showing that the carrier had held out and performed a general towage service for the public although *a large part* of the transportation by such carriers on and since January 1, 1940, *fell within various* exemptions specified in the act or by our orders thereunder. See *Russell Bros. Towing Co., Inc., Common Carrier Application*, 250 I.C.C. 541. In those proceedings, however, it was shown that the carriers engaged *in a comprehensive towage service* which included the transportation of diversified commodities, including transportation which would be subject to regulation if it were not for our general orders of exemption. *The specialized towage of one commodity by applicant on and since January 1, 1940, does not constitute the performance of general towage.* (Emphasis ours)

As a matter of fact the decision in the *Russell Bros. Case, supra*, became obsolete for all practical purposes with the decision of the Commission in *Moran Towing and Transp. Corp. Appln.*, 260 I.C.C. 269. The liberal construction employed in the *Russell Bros. case*, had to do only with the nature of the commodities transported.[6] Further, the Russell Bros. application was for "towage" rights only, as distinguished from "freighting" rights. In the former

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[6] Here the appellants allege error because the Commission did not take into account such services as towage for other carriers, etc., which are exempt by their very nature and which exemption is jurisdictional.

the operator furnishes only the motive power and performs only the physical act of towing a barge or barges owned or leased by the shipper, without regard to and often without any knowledge of what is loaded in the barge. Having this practical consideration in mind the Commission, in the *Moran Case, supra,* held that where towage rights, only, are involved the nature of the commodity loaded in the barge is not determinative on the question of operating rights.

3. The Commission Has Committed No Error In Its Consideration and Evaluation of the Evidence of Record

In this contention appellants accuse the Commission of "atomizing, pulverizing and molecularizing" the evidence of record to their detriment. The first two words are borrowed from the decision in *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, in which, as we have pointed out, the Court held that the term "bona fide operations" contained in the grandfather clause "carries the connotation of substantiality, etc." and in which it squarely upheld the Commission's action in cutting down the claimed territorial rights. The words "atomize and pulverize" were used only in criticism of the action of the Commission in dealing too strictly with the matter of *commodity* coverage. Even a casual reading of the decision of the Court on the second point involved will show not the slightest resemblance to the factual framework of this case. Incidentally, the applicant there was a *common* carrier, a distinction upon which we shall elaborate later.

The word "molecularize" was lifted from context in the decision in *Barrett Lines* v. *United States,* 326 U. S. 179. But there again, the Court will observe that the Commission's decision as to the grant of operating authority as a *carrier* was affirmed. It was only on the question of "chartering" that the case was remanded.

What appellants are really objecting to is the painstaking manner in which the Commission analyzed their evidence. At page 20 of their last petition for reconsideration filed with the Commission they state:

> We do not deny that you have correctly summarized proof of operations.

In the final analysis appellants, themselves, are contending that the Commission should have "atomized, pulverized, and molecularized" the shipments billed as "contractors' equipment" so as to provide a predicate for a grant of authority to transport general commodities.

4 and 5. *The Commission Committed No Error In Saving To Appellants For the Future The Right To Continue To Perform Any and All Of The Subject Transportation Performed During The Critical Period.*

We consider these two contentions together because in our judgment they are not only at war, each with the other, but point up in a very effective way the propriety of the Commission's decision.

In contention 4 appellants argue that the Commission may not "lawfully freeze the carriers future operations into the *precise pattern* of former operations" and in contention 5 that they are entitled to a permit for the future "which will preserve *substantial parity* between future operations and prior bona fide operations." Unless we are to split hairs between the import of the expressions "precise pattern" and "substantial parity," it seems to us that appellants are aggrieved because the Commission has done exactly what they say it should have done.

Unless the Commission does strive to word its permits under the "grandfather clause" so as to preserve to an applicant for the future the right to conduct substantially

(or precisely if you will) the same operations it has conducted in the past, it is perfectly obvious that it would be granting authority for a new or different type of operation without the requisite proof required by the statute with respect to such operations. The doctrine of "substantial parity" was fully affirmed and restated by the Court in *Alton R. Co.* v. *United States*, 315 U. S. 15, page 22.

6. *The Commission Did Not Err In Limiting The "Freighting" Rights Granted To The Transportation of Forest Products.*

There is nothing in this decision which states either directly or by necessary implication that the Commission has found that "the Interstate Commerce Act may be lawfully construed (so) as to limit the granting of authority to transport of a general class of commodities to common carriers by water and to prohibit the granting of such authority to contract carriers" as alleged. The Commission has simply found that in its "freighting" operations during the critical period the applicant had not conducted a "bona fide operation" with respect to general commodities as a contract carrier. The basic findings are in *Warner and Tamble Contract Carrier Application*, 265 I. C. C. 147, at 151, and read:

Freighting Operations

Commodities.—Applicants' freighting operations, i.e., operation by non-self-propelled vessels with the use of separate towing vessels, have consisted almost exclusively in the transoprtation of contractors' equipment and forest products. The only other freighting operations shown to have been performed were: 32 bargeloads of cattle in 1934, 4 bargeloads of rice in 1936, 2 bargeloads of reinforcement bars in 1938, and several bargeloads of gasoline during 1941, 1944, and 1945. The contractors' equipment handled is that previously referred to and for which an order of exemption will be

issued. Forest products, principally logs, were handled in considerable volume each year. Applicants insist that since the commencement of their operations, they have conducted a varied service, and have transported substantially all commodities moving over inland waterways. They contend that notwithstanding the grant to them of an order of exemption covering a wide range of commodities such as contractors' equipment, they are nevertheless entitled to a permit authorizing the transportation of commodities generally. The movement of cattle in 1934 was an emergency movement occasioned by drought in the West during that year. In the event of a similar emergency, applicants may obtain temporary authority to handle such traffic under section 311(a). The movements of rice in 1936 and reinforcement bars in 1938 were isolated operations which have not been repeated since that time. The gasoline moved was in bulk in certified tank vessels, and applicants need no authority from this Commission to continue their handling of commodities in bulk. The record does not establish bona fide operation by applicants as a carrier of commodities generally, and the application for authority to continue handling commodities other than forest products will be denied. Applicants will be authorized to continue their handling of forest products.

In the last report of the Commission, here sued upon, it reaffirmed those findings.

The Commission has never construed the statute as prohibiting a grant of authority to handle general commodities to a contract carrier if the evidence shows that an applicant actually freighted general commodities during the critical period. In *C. G. Willis Contract Carrier Application*, 250 I. C. C. 179, it granted a permit to handle general commodities from Norfolk, Va., to New Bern, N. C., on proof that applicant had transported a complete line of general merchandise to a jobber at that point. On the other phases of its operation applicant was held to the transportation

of specific commodities. Similarly, in *Atwacoal Transportation Co., Application*, 260 I. C. C. 620, the Commission granted general commodity authority to a contract carrier on proof that it "had in fact handled a wide variety of articles."

We submit that proper administration of the Act demands that the Commission exercise great care in granting general commodity authority to a contract carrier because such a broad grant is, on its face, opposed to the statutory concept of contract carriage.[7] The Act, in Section 302(d) carries the classic definition of a common carrier, to wit, as:

> any person which holds itself out to the general public to engage in the transportation by water * * * of property * * *

In direct contrast the statute in ibid, paragraph (e) defines the contract carrier as:

> any person which, under *individual* contracts or agreements, engages in the transportation (*other* than transportation referred to in par. (d) * * *) by water * * * of property * * * (Emphasis ours.)

It is thus clear that the two types of carriers are in contradistinction and the moment the individuality, peculiar to contract carriage, becomes general or indiscriminate in its nature, there is a metamorphosis over into common carriage. Furthermore, the statute relating to grants of permits for contract carriage specifically requires the Commission to state in such permit:

> The business of the carrier and the scope thereof.

A splendid dissertation upon the basic difference between the two types of carriage and the necessity of being specific

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[7] The so-called "contract" carrier is purely a creature of statute, being unknown to the common law.

in granting permits to contract carriers is in *Noble* v. *United States*, 319 U. S. 88, at pages 91, 92.

We submit that the appeal presents no question which is either novel or substantial, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

LUCIUS E. BURCH, JR.,
HARRY C. AMES,
Attorneys for Intervening Defendants.

Of Counsel:

AMES, HILL & AMES,
Transportation Building,
Washington 6, D. C.

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No. 641

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IN THE

SUPREME COURT OF THE UNITED STATES.

RUSSELL V. WARNER and GEORGE H. TAMBLE, a Partnership, Doing Business as WARNER AND TAMBLE TRANSPORTATION COMPANY,
Appellants,

vs.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From the United States District Court for the Western District of Tennessee, Civil Action No. 1742.

APPELLANTS' BRIEF

In Opposition to Motions to Affirm Filed on Behalf of Defendants and Interveners.

JAMES W. WRAPE,
GLENN M. ELLIOTT,
1804 Sterick Building,
Memphis, Tennessee,
Attorneys for Appellants.

Of Counsel:
WRAPE and HERNLY,
Attorneys at Law,
1804 Sterick Building,
Memphis, Tennessee,
1624 Eye Street, N. W.,
Washington, D. C.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

RUSSELL V. WARNER and GEORGE H. TAMBLE, a Partnership, Doing Business as WARNER AND TAMBLE TRANSPORTATION COMPANY, Appellants, vs. UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, Appellees.	On Appeal From the United States District Court for the Western District of Tennessee, Civil Action No. 1742.

APPELLANTS' BRIEF

In Opposition to Motions to Affirm Filed on Behalf of Defendants and Interveners.

May It Please the Court:

PRELIMINARY STATEMENT.

Pursuant to Rule 7 (3) of the revised Rules of the Supreme Court of the United States, appellants Russell V. Warner and George H. Tamble, a partnership, doing business as Warner and Tamble Transportation Company, submit this, their brief in opposition to motions to dismiss, filed on behalf of appellees United States of America and The Interstate Commerce Commission, and on behalf of interveners below, American Barge Line Company, Mississippi Valley Barge Line Company and Union Barge Line Corporation. Both motions to affirm are predicated

upon the same basis, i. e., that no substantial question is involved, and essentially similar arguments are presented in support thereof.

This is a direct appeal from a final judgment and decree entered by a district court of three judges, such court being constituted pursuant to U. S. Code, Title 28, Secs. 2284 and 2325, dismissing appellants' complaint which sought to set aside an order made by The Interstate Commerce Commission, hereinafter referred to as the Commission. No question was made as to the jurisdiction of the court below, nor is any question raised as to the jurisdiction of this court, other than that no substantial question is presented by the appeal. The appeal has been duly allowed and perfected, the record filed and the case docketed with the clerk of this court.

On September 18, 1940, Part III of the Interstate Commerce Act was enacted, 54 Stat. L. 929, U. S. Code, title 49, Secs. 902 et seq. Prior to such time Congress had not endeavored to regulate transportation by water, and for a period of more than twenty-five years appellants had been engaged in performing varied and extensive water carrier transportion service throughout the broad reaches of the Mississippi River, its tributaries and tributaries of its tributaries, as well as upon the Gulf Intracostal Waterway.

By the order of the Commission attacked and the affirmance thereof by the court below appellants will not only be deprived of the opportunity to continue to perform a transportation service comparable in any respect to that which they had previously performed, but, as a matter of fact, thereby their operations have been so curtailed and restricted as to render it problematical whether they will be able to remain in business.

This appeal presents for determination new and novel questions of construction, application and enforcement of

Part III of The Interstate Commerce Act, supra, hereinafter referred to as the act, and challenges the legality of the order of the Commission and the decree of the court below. It is based upon the fact that the Commission has arbitrarily and unlawfully misinterpreted the act as well as controlling principles heretofore enunciated by this court.

Appellees do not deny that the record in this case conclusively establishes that for a period of more than twenty-five years, prior to enactment of Part III of the act, appellants held themselves out as being willing to perform, and did perform, a call and demand water transportation service for all who had need therefor, without restriction as to territory, commodity transported or ownership thereof, use to which such commodity was to be put or site of such use, and irrespective of the business in which appellants' customer was engaged. The only restriction on the holding out was that a satisfactory contract could be negotiated. The service offered and performed included not only freighting and towing by the use of self-propelled vessels and non-self-propelled vessels with self-propelled vessels attached, but also the furnishing of non-self-propelled vessels and of self-propelled vessels with non-self-propelled vessels attached under charter, lease or other arrangement, both bare-boat and fully-found.

In 1940 appellants owned five towing vessels ranging from 150 to 1200 horse power, four flush-deck steel barges, two certified tank barges, one anchor barge, one derrick boat and two tug boats of 125 and 150 horse power; in 1945, all of the foregoing equipment was still owned plus one tow boat of 275 horse power, one flush-deck steel barge, two steel hopper barges, two certified tank vessels and one wharfboat (265 I. C. C. 147, 149).

PROCEEDINGS BEFORE THE COMMISSION.

The administrative processes, resulting in the order of the Commission attacked in the court below, were put in motion on December 30, 1940, and from that time until February 10, 1950, the effective date of the final order, a state of confusion and indecision obtained within the Commission, as to the position ultimately to be adopted with respect to appellants' rights under the Act, as witness the reopenings, reconsiderations, rehearings and reargurments referred to in the motions to affirm, the final result being the issuance of an arbitrary and unlawful order by the Commission.

In the early days of administrative indecision following enactment of the act appellants deemed it advisable to file and did file on December 30, 1940, under the provisions of sec. 303 (e) of the act [U. S. Code, title 49, sec. 903 (e)], an application under which it sought to have its operations as a contract carrier by water in the transportation of logs and "equipment of contractors working on the river and levees," requiring the use of special equipment, declared exempt from regulation under the Act.[1]

The application aforesaid was assigned No. W-64, and designated as "Warner and Tamble Transportation Company—Exemption Sec. 303 (e)," and is hereinafter referred to as the exemption application.

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1 The pertinent portion of Sec. 303 (e) is as follows: "It is hereby declared to be the policy of Congress to exclude from the provisions of this part, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment, or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this part or part I or part II. Upon application of a carrier, made in such manner and form as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this part such of the transportation engaged in by such carriers as it finds necessary to carry out the policy above declared."

Before a hearing on the exemption application appellants, under the "grandfather clause" of part III of the act [U. S. Code, title 49, sec. 909 (f)], filed an application for a permit as a contract carrier by water of commodities generally "between points on the Mississippi River and its tributaries, including all streams which flow into the Mississippi, including the Illinois River, waterways, and canals, the harbor of Chicago and South Chicago." This application, filed on May 28, 1941, was also assigned No. W-64, and designated "Russell V. Warner and George H. Tamble—Contract Carrier Application." It is hereinafter referred to as the contract carrier application. In the application, on sheet 2 thereof, it was set forth that "exemption is claimed for the hauling of logs and levee equipment under section 303 (e), Docket No. W-64."

Following a hearing on the exemption application held on June 2, 1941, on May 9, 1942, the Commission issued its report and order (250 I. C. C. 803, not printed in full, but a full print is of record in this proceeding), in which it was found and ordered that the transportation of logs was not exempt, but that:

> "We find that applicant's transportation of contractors' equipment used in making levees and digging cut-offs, between points on the Mississippi River, and its tributaries, is transportation which by reason of the inherent nature of the commodities transported, and their requirement of special equipment, is not actually and substantially competitive with transportation by any common carrier subject to the provisions of parts I, II, or III of the act, and is within the policy of Congress, as declared in sec. 303 (e) of the act, to exempt from the provisions of part III of the act; and that its exemption by order is necessary to carry out this policy of Congress."

In this connection, at sheet 3 of the report and order, supra, the Commission said:

"The findings herein **are without prejudice** to whatever conclusions may be warranted on the **application for a permit** which applicants filed subsequent to this application for exemption." (Emphasis supplied.)

There was but one exemption application filed, and but one hearing thereon. With the exception of evidence adduced in support of the exemption claimed for the transportation of logs the only evidence adduced was in support of the exemption claimed for the transportation, by use of **special equipment**, of equipment of contractors **used in making levees and digging cut-offs**. The special equipment used in such transportation consisted of one over-size barge (265 I. C. C. 147, 150). The foregoing is of significance in the light of the final order of the Commission attacked in this litigation.

The contract carrier application was filed to obtain a permit to which applicants were entitled as a matter of presumptive right under and by virtue of sec. 309 (f) of the act [U. S. Code, title 49, sec. 909 (f)].[2]

The contract carrier application was finally assigned for hearing and heard in May, 1946, and a report and order issued thereon on July 7, 1947 (265 I. C. C. 147), followed by reopening and further hearing in April, 1948, and the issuance of an "amended permit and order" on May 17, 1949, and later in the same day issuance of a "corrected

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2 The pertinent portion of said section is as follows: "Except as otherwise provided in this section and sec. 311, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission, authorizing such operation: **Provided**, that subject to sec. 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in sub-section (g) of this section and prior to the expiration of one hundred and twenty days after this section takes effect."

amended permit and order." The permits and orders of May 17, 1949, are not reported, but the report of the Commission on which same are founded is reported at 265 I. C. C. 543.

The "amended permit and order" of May 17, 1949, is on the reverse side of sheet 9 of the mimeographed "Report of the Commission on further hearing" appearing in the transcript, while the "corrected amended report and order" also appears therein. The practical effect is that, among other authority granted, by the first permit and order applicants were authorized to perform a general towage service along the Mississippi River and its tributaries, with the exception of the Ohio River above Paducah, Kentucky, and the Gulf Intracoastal Waterway, whereas, without further hearing, by the second permit and order issued the same day, the Commission arbitrarily further restricted and limited the towing authority granted by providing that such towing was to be performed only "below and including Cairo."

In contra-distinction to the varied and extensive transportation service previously performed by applicants, as will hereinafter be pointed out, the final permit and order of May 17, 1949, arbitrarily and unlawfully limited applicants' future contract carrier operations to the following:

> "**It is ordered**, That applicants be, and they are hereby, authorized to continue operations as a contract carrier by water, in interstate or foreign commerce, (1) by non-self-propelled vessels with the use of separate towing vessels in the transportation of forest products, between ports and points along the Mississippi River and its tributaries (not including the Ohio River or the Gulf Intracoastal Waterway) below and including Cairo, Illinois, (2) by towing vessels in the performance of general towage between points along the Mississippi River and its tributaries

(not including the Ohio River above Paducah, Kentucky, or the Gulf Intracoastal Waterway) below and including Cairo, and (3) at Memphis, Tennessee, in the furnishing for compensation under charter, lease, or other agreement of non-self-propelled vessels to persons other than carriers subject to the act, to be used by such persons for the transportation of their own property."

Thus, it is seen that not only is the territory within which applicants are permitted to operate drastically restricted and curtailed, but that the only commodities which it is authorized to transport under its permit are forest products, and that it is precluded from furnishing self-propelled vessels either on a fully-found or bare-boat basis under charter, lease, or other agreement.

Of its own volition the Commission (statements in the reports to the contrary notwithstanding) reopened the exemption proceeding (265 I. C. C. 147, 265 I. C. C. 543), set aside its report and order of May 9, 1942 (partially reported 250 I. C. C. 803), and progressively enlarged the scope of the exemption until, by the permit and order of May 17, 1949, as it finally evolved, it is provided:

"**It is further ordered**, That until further order of the Commission, transportation engaged in by applicants as a contract carrier by water, of contractors' equipment, and materials and supplies incidental to and used with contractors' equipment, employed in construction work on the Mississippi River and its tributaries, and at points along such waterways, be, and it is hereby, exempted from the provisions of part III of the act."

As will be demonstrated, however, neither does the permit nor exemption, individually or collectively, enable applicants to perform a transportation service by any means

comparable to that performed during the critical period, nor allow the maintenance of substantial parity between future and past bona fide operations.

THE COMMISSION ORDER IS ARBITRARY, UNLAWFUL, AND RESULTS FROM APPLICATION OF ERRONEOUS STANDARDS.

Before referring to the Commission's treatment of the individual types of transportation involved, we respectfully direct attention to the over-all aspects of the reports on which the order of May 17, 1949, is founded (265 I. C. C. 147 and 265 I. C. C. 543).

It has long since been established that the "grandfather clause" features of the act are remedial legislation, to be liberally construed, and in such manner as to preserve the position in the industry which applicants have struggled to obtain, and to maintain substantial parity between future operations and bona fide past operation. **Alton R. R. Company v. United States**, 315 U. S. 15; **Barrett Line v. United States**, 326 U. S. 175; **United States v. Carolina Freight Carriers Corporation**, 315 U. S. 475.

The reports and order here attacked do violence to the act, as well as to controlling principles enunciated by this court and previous decisions of the Commission in that the strictest possible construction of both the act and the evidence is applied, no consideration is given to applicants' over-all operation, and the only means by which issuance of such a highly restricted and damaging permit was justified was by the adoption of findings and conclusions resulting from the application of a method of "atomizing, molecularizing, and pulverizing" applicants' proof of operation into many and varied sections, and then dealing with such varied sections as separate operations

when, in fact, applicants' operations have always been conducted as a whole and not departmentalized or divided either as to time, commodity or service. In this connection it is obvious that the Commission has meticulously separated applicants' proof of operations into periods before and after January 1, 1940, with a further breakdown for specific years; as a next step a very fine distinction for such periods of time is drawn between types of service rendered; and then, for such periods of time and types of service rendered there is a further breakdown territorially, accompanied by additional pulverization and distinction between transportation said to be "exempt" or "not exempt", followed by grouping all commodities—transported, transportation of which was considered by the Commission, into two broad classifications generically described as "contractors' equipment" and "forest products". The result was the issuance of a highly restricted order which effectively freezes future operations of this carrier, not even to the precise pattern of its past operations, but to a pattern less broad in scope commodity-wise, territorially-wise, and service-wise.

At this point it should be noted further, that implementing the atomization, pulverization and molecularization, the Commission failed and refused to consider oral evidence adduced at the hearings with respect to past operations, and based its findings solely upon documentary evidence, this in the face of substantial oral testimony with respect to commodities transported and services performed not reflected by available records. It was established that only such records had been kept as were necessary for revenue purposes, but it is significant that no transportation supported by oral evidence is mentioned by the Commission in its reports.

In addition, and of great significance, in determining the extent to which applicants had been engaged as a bona

fide water carrier under the "grandfather clause", the Commission excluded from consideration all evidence with respect to instances of transportation performed, regardless of when performed, which, at this date, are considered exempt from regulation by the Commission either by reason of the provisions of the act, such as commodities in bulk [U. S. Code, title 49, sec. 903 (b)], liquefied cargoes in certified tank vessels [U. S. Code, title 49, sec. 903 (d)], transportation or services performed for other carriers subject to the act, transportation which was intra-state in character, as well as transportation considered exempt under general orders of the Commission such as floating objects, **Towage of Floating Objects**, 49 C. F. R., Cum. Supp. 315.2, or those considered exempt under particular orders of the Commission such as "contractors' equipment, etc.", held exempt by the order of May 17, 1949, which order did not become effective until February 10, 1950.

Thus, only a **very small segment** of applicants' transportation service has been considered by the Commission in reaching the findings and conclusions reflected by its reports, supra. The findings of the Commission are, therefore, not basic findings supported by substantial evidence and, as we will now demonstrate, the method employed by the Commission was arbitrary and contrary to law, its conclusions are unlawful and its finding not supported by the facts of record.

Irrespective of support to applicants' position furnished by controlling decisions of this court and of the Interstate Commerce Commission to which we will refer later, congressional intent as reflected by the act clearly establishes that the Commission is without statutory authority to refuse to consider, in support of a "grandfather clause" application, evidence of transportation performed prior to enactment of part III of the act or prior to subsequently

promulgated administrative edicts simply because such transportation is now considered exempt. Let us first look at the pertinent provisions of section 309 (f) of the act [U. S. Code, title 49, sec. 909 (f)] which, again quoted, are as follows:

> ". . . **Provided,** that, subject to sec. 310, if any such carrier or a predecessor in interest **was in bona fide operation as a contract carrier by water on January 1, 1940,** over the route or routes or between the ports with respect to which application is made, and has so operated since that time . . . the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g) of this section and prior to the expiration of one hundred and twenty days after this section takes effect." (Emphasis supplied.)

It is significant that Congress placed **no limitation** upon a carrier's presumptive right to a permit under this "grandfather clause" **except that the carrier must have been in "bona fide operation as a contract carrier by water on January 1, 1940, etc."** The order of the Commission attacked, on the other hand, is based upon reports which read into this section the proviso that **only transportation subject to regulation** is to be considered in determining whether a carrier was in bona fide operation as a contract carrier before the critical date; the further proviso is read into the act that no transportation, regardless of when performed, declared to be exempt from regulation by the act or by general or specific exemptive order or edict of the Commission is to be so considered; further, there is read into the act the proviso that no transportation service performed by an applicant for another carrier subject to the act is to be considered in determining an applicant's rights under the "grandfather clause."

Such administrative amendments to the act are clearly outside the scope of the Commission's statutory authority. The unreasonableness thereof in connection with "grandfather clause" applications is easily demonstrated. Such service as was offered and such transportation as was performed by applicants prior to January 1, 1940, was done and performed without any idea of congressional enactment or administrative edict. Whether or not it was a bona fide service offered and performed should be determined by the facts as they existed at that time. Note, however, the practical effect of the Commission's ruling: to cite one example, i. e., the ruling that transportation included within the purview of the exemption granted by the order of May 17, 1949, cannot be considered as supporting the "grandfather clause" application, regardless of when performed. The action of the Commission gives the provisions thereof **ex post facto application not only to January 1, 1940, the critical date, but, in addition, to the entire period prior to 1940 considered pertinent to such applications.** In the first place, no transportation performed prior to January 1, 1940, by any law or regulation had been exempt or non-exempt from anything. In the next place, no transportation performed by applicant between January 1, 1940, and May 9, 1942, had been considered exempt under Section 303 (e) of the Act [U. S. Code, Title 49, Section 903 (e)], such date being the date of the Commission's exemptive order partially reported 250 I. C. C. 803, and, at that time, the exemption was limited to contractors' equipment used in making levies and digging cut-offs on the Mississippi River and its tributaries; subsequently, however, by its report of July 7, 1947 (265 I. C. C. 147), the Commission enlarged the scope of the exemption to cover commodities and operations previously not considered exempt in any manner whatsoever, and, by successive enlargement and the report of May 17, 1949, 265 I. C. C. 543, additional transportation services were brought within the purview of the exemption, at which

time the order of May 17, 1949, was made retroactive throughout the entire pertinent period by refusal of the Commission to consider any transportation performed within the purview of the exemptive order of May 17, 1949, as being part of applicant's bona fide operation. Another practical example is that with respect to vessel furnishing, which will be discussed later, wherein the Commission makes its definition of "charter" for the entire critical period dependent upon its definition of "demise" not enunciated until June 24, 1948, in **Barrett Line, Inc.**—Contract Carrier Application, 265 I. C. C. 361, and that after the Supreme Court had sustained an attack upon a prior ruling of the Commission, as appears in **Barrett Line, Inc., v. United States et al.**, 326 U. S. 179.

The foregoing misconstruction of the statute and misapplication of governing principles is, within itself, we respectfully present, such a substantial question as to justify assumption of jurisdiction by this court.

It is not the contention of appellants that this court should weigh the evidence in this case nor that the court should substitute its judgment for that of the Commission on transportation problems or pass on the correctness of the reasoning of the Commission. It is our position, however, that the court has jurisdiction to review the action of the Commission and to determine whether the Commission has acted arbitrarily or unlawfully, including jurisdiction to determine whether or not the Commission has considered or refused to consider pertinent evidence adduced in support of an application, and whether the Commission, by the application of correct legal principles thereto, has reached lawful conclusions. If the order deprives the carrier of a statutory right or, for any reason, is contrary to law, then it is the province and the duty of this court to set aside the attacked report and order. U. S. Code, title 49, secs. 17 (9) and 916 (a). **Interstate Com-**

merce Commission v. Louisville & Nashville R. R., 227 U. S. 88; **U. S. v. Pierce Auto Lines**, 327 U. S. 515; **U. S. v. Carolina Freight Carriers Corporation**, 315 U. S. 475.

We are cognizant, as well, of the fact, so strenuously urged by the Commission in its motion to affirm, that this court is not concerned with administrative inconsistency. We do respectfully present, however, that, where in similar situations, decisions of the Commission are so inconsistent as to be diametrically opposed, as a matter of law, that it is the province of the court to determine which inconsistent position of the Commission most nearly coincides with the intention of Congress in the enactment of the act and the construction thereon heretofore placed by this court. This we say in view of the fact that the report and order of the Commission in this case is in direct conflict with previous decisions of the Commission, as well as of this court.

Unless it was the intent of Congress to provide different criteria for determining the "grandfather rights" of common and contract water carriers [which certainly was not the intent of Congress inasmuch as the provisions of sections 309 (a), applicable to common carriers, and 309 (f), applicable to contract carriers, are identical, U. S. Code, title 49, sec. 309 (a) (f)], the decision of the Commission in **Russell Bros. Towing Company, Inc.—Common Carrier Application**, 250 I. C. C. 429, is controlling. The report in the case at bar is contra to such case. In the **Russell Bros.** case, supra, the carrier applied under the "grandfather clause" for a certificate authorizing it to continue towage of general commodities (and similarly being in doubt as to its status under the act filed application for an exemption permit). The Commission, in considering the rights of a common carrier, enunciated principles which, until its report in this case, have been controlling, when it said, 250 I. C. C. 429, 433:

"It will be noted from the description of applicant's operations that a large portion of the towage performed is in connection with transportation which is exempt from regulation under Part III of the Act because, for instance, the commodities are shipped in bulk, or the service is within a harbor. Question arises, then, as to whether in determining the character of traffic with respect to which, and the territory within which, applicant has been in bona fide operation on and since January 1, 1940, consideration should be limited only to transportation which is subject to regulation.

"A common carrier by water is defined in part III of the act as 'any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation . . .' Under the 'grandfather' clause, an applicant for a certificate must show that it 'was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time . . .'"

"It will be noted that in neither instance is there any reference to whether the transportation performed by the carrier is or is not subject to regulation. In determining a carrier's status and the scope of its operations during the 'grandfather' period, **its entire operation should be considered**, and not merely that part which Congress has seen fit to make subject to regulation. To find that 'grandfather' rights may be granted only to the extent that a showing is made as to the performance of regulated transportation **requires the reading into the law of language which, in fact, is not there.**

"This matter is particularly important in instances like the present where an applicant is seeking a cer-

tificate covering all commodities, or general cargo. **Obviously no carrier actually transports all commodities, and therefore the bona fides of an applicant's operations depend on the representative character of the transportation performed.** It may well be that the carrier holds itself out to, and actually does, transport all traffic offered to it from and to all points covered by its application but that the great bulk of such transportation is exempt from regulation. **It seems clear that if we shut our eyes to all of applicant's transportation except that which is subject to regulation, we get an incomplete and distorted picture of the nature and extent of its operations. To place limitations upon 'grandfather' rights predicated upon that view would be unjust and unreasonable, and is not contemplated by the law."** (Emphasis supplied.)

The foregoing decision of the Commission, as we will hereinafter demonstrate, has been cited with apparent approval by this court. The question, however, of whether different criteria are to be determinative of the "grandfather" rights of a **contract** water carrier as distinguished from a **common** carrier has heretofore neither been presented to nor determined by this court, and such issue, being present in this case, presents a substantial question.

Another decision of the Commission in a comparable proceeding wherein Division 4 applied the standards and criteria applied in the case at bar, and was reversed by the entire Commission, is that in the case of **Zigler Company** Application, original report 265 I. C. C. 265, report of the entire Commission on reconsideration 265 I. C. C. 404, and second report of the entire Commission 265 I. C. C. 539. In the **Zigler Case**, supra, as in the case at bar, both an application for a permit to operate as a contract carrier and an application seeking to have the transportation involved declared exempt were filed. Applicant

sought authority to transport commodities generally by non-self-propelled vessels with use of separate towing vessels, performance of general towage, and in the furnishing of vessels under charter or lease to persons other than carriers subject to the act. Division 4 refused to take into consideration evidence of transportation performed which was either not subject to the act or where, as in the case of towage, the exact nature of the commodity towed was not shown. 265 I. C. C. 265.

The entire Commission, on reconsideration, said (265 I. C. C. 404, 405):

> "Applicant has been engaged in water transportation since long prior to the 'grandfather' date. **Its principal service has consisted of transportation of commodities in bulk**, particularly petroleum products, which transportation is exempt from regulation by the provisions of sec. 303 (b) or (d) of the act. It also has towed vessels **for other water carriers** subject to part III. Under sec. 303 (f) (2) towage performed by applicant for other carriers subject to the act is not subject to the provisions of part III of the act, except as a part of the operations of such other carriers. In addition, applicant has **towed floating objects** such as derrick and drilling barges for shippers. The transportation, as a contract carrier, of floating objects such as derricks, dredges, tanks, caissons, pontoons, and other floating objects, other than logs and piling in rafts, which are not designed or used for the carrying of passengers and property, has been exempted from the requirements of part III of the act until the further order of the Commission. **Towage of Floating Objects**, 49 C. F. R., Cum. Supp. 315.2.
>
> "Applicant, however, contends that it **has not and does not confine itself to exempt transportation, and that its equipment is used in any water-carrier service**

requested by its patrons, but, owing to its individual service and the limited offerings which consisted for the most part of petroleum products since 1940, only a small amount of other transportation has been performed.

"Commodities other than in bulk handled by applicant in its freighting service prior to January 1, 1940, were: Rocks (individually loaded), oil-field machinery, tank steel, steel pipe, oil drilling rigs, logs, cattle, rice in sacks, sugar cane, sugar in bags, oil tanks, piling, an engine and oil-well casing. Its towage service performed prior to January 1, 1940, has consisted of the towing of dredges, derricks, disabled tugs, empty barges, engines, drilling rigs, barge loads of steel, lumber, pipe, baroid and baroco (drilling mud) in bags, and trucks. **Although some of the foregoing transportation was performed by applicant for other water carriers, or was intrastate in character, nevertheless these services evidence applicant's ability and willingness to perform subject water-carrier service in the territory claimed. Since January 1, 1940, by far the greater proportion of applicant's service consisted of the movement of petroleum and other transportation not subject to regulation.**

* * * * * * *

"Considering all the circumstances, particularly its long-continued and successful service prior to the 'grandfather' date, and the nature of traffic handled by water carriers along waterways of Louisiana and Texas, the actual operations of applicant were sufficiently varied in character and scope to indicate that it did not limit its operations to exempt transportation. **Moreover, the fact that applicant has not performed a large proportion or a wide variety of non-exempt service, should not be construed as a proper basis for denying the application, or for a grant of**

limited authority as proposed by protestants, so that applicant would not be able to continue the character of service it has been engaged in. Compare **Russell Bros. Towing Company, Inc., Common Carrier Application**, 250 I. C. C. 429; **Moran Towing & Transportation Company, Inc., Applications**, 250 I. C. C. 541; **Chotin and Pharr, Inc., Contract Carrier Application**, 261 I. C. C. 713; and **Terrebone Towing Company, Inc.**—Exemption, secs. 302 (e), 303 (h), 260 I. C. C. 551." (Emphasis supplied.)

Insofar as this court has had occasion to consider the principles applicable to the issues in this case, the principles by the Commission herein have been repudiated.

In **United States v. Carolina Freight Carriers Corporation**, 315 U. S. 475, the court had under consideration an order of the Commission issued on an application by a motor common carrier for a certificate under the "grandfather clause" of part II of the Interstate Commerce act (U. S. Code, title 49, sec. 306). The "grandfather clause" features of parts II and III of the act are identical [U. S. Code, title 49, secs. 306 (a), 909 (f)]. The order of the Commission established different standards for determining the "grandfather" rights of regular as distinguished from irregular route motor carriers, and authorized a certificate highly restricted commodity-wise and territorially-wise which froze the carrier's future operations in the precise pattern of its past operations.

After reviewing the authority vested in the Commission by the act the court, at page 481, said:

> "As we indicated in **Alton R. Co. v. United States, supra** (315 U. S. 15), the purpose of the 'grandfather clause' was to assure those to whom Congress had extended its benefits a 'substantial parity between future operations and prior **bona fide** operations."

And then, after observing that while the carrier was established to have been transporting a general class of commodities the Commission had eliminated commodities which, though of the same general class as the others, had not been transported during the critical period, or which had not been transported in substantial amounts and with a degree of regularity, recognizing that a carrier's service might have been restricted to transportation of only a limited number of commodities, the court, at page 483, said:

> "On the other hand, if the applicant has carried a **wide variety of general commodities, he cannot necessarily be denied the right to carry others of the same class merely because he never carried them before.** And where he has carried a wide variety of general commodities, **he cannot necessarily be restricted to those which he carried with more frequency and in greater quantities than the others.** . . . The Commission may not **atomize** his prior service, product by product, so as to restrict the scope of his operations, where there is substantial evidence in addition to his holding out that he was in **'bona fide** operation' as a 'common carrier' of a large group of commodities or of a whole class or classes of property. There might be substantial evidence of such an undertaking though the evidence as to any one article was not substantial. The broad sweep of his prior service may indeed have made the carriage of any one commodity irregular and infrequent. **Yet, viewed as a whole rather than as a group of separate and unrelated items, his prior activities may satisfy the test of 'bona fide operations' as a 'common carrier' within the scope of his holding out.** The fact that some of the articles may have been carried before, but not after June 1, 1935, may of course indicate an abandonment of the prior undertaking. See U. S. v. Maher, 207 U. S. 148. But it does not necessarily mean that

they should be stricken from the certificate, **since the natural and normal course of his business may reveal a continuous undertaking to transport any or all commodities embraced within the group or the class. That is to say, he may have been a common carrier of a large group of general commodities or of an entire class of property both before and after the critical date though the specific commodities carried vary considerably.**" (Emphasis supplied.)

And then, after noting that applicant theretofore had not transported certain specified commodities between specified points, but had not restricted its operation to preclude transportation thereof, the court at page 488, said:

"Appellees '**bona fide** operation' may possibly be limited only to those articles actually carried. But where it was actively soliciting whatever it could get at any of the points, it does violence to its common carrier status to make the origin or destination of future shipments conform to the precise pattern of the old **Such a pulverization of the prior course of conduct changes its basic characteristics. There is no statutory sanction for such a procedure.**

"To appellees such matters involve life or death. Empty or partially loaded trucks on return trips may well drive the enterprise to the wall. A restriction in this case of the commodities which may be carried from any one point on south bound trips is a patent denial to appellee of that 'substantial parity between future operations and prior bona fide operations' which the act contemplates. **Alton R. Co. vs. United States, supra.** Its prior opportunity should not be restricted beyond the clear requirements of the statute. **For this act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system. To freeze them into the precise pattern of their prior ac-**

tivities, as was done here, not only may alter materially the basic characteristics of their service, it also may well be tantamount to a denial of their statutory rights.'' (Emphasis supplied.)

No more statutory justification for the establishment of different criteria for determining the rights of contract or common water carriers, to transport a general class of commodities, exists in part III than existed in part II with respect to regular and irregular route motor carriers. Different standards **have been applied** by the Commission in this case, however, in determining a contract carrier's ''grandfather'' rights from those applied in determining common carrier's "grandfather" rights. Compare **Ohio River Company Application**, 260 I. C. C. 501, and the unpublished report in **Clifton Towing Company**, referred to in 260 I. C. C. 802, 803.[3]

In the case at bar, the Commission has unlawfully ''atomized'' and ''pulverized'' applicant's past operations to effectively freeze its future operations into a precise pattern even less extensive than past operations, and, while admitting that applicant has transported a wide range of commodities (265 I. C. C. 543, 549), refuses to permit applicant to transport other commodities of the **same general class**, or even the specific commodities heretofore transported, unless they are to be transported for the **same class of shipper** and are to be used for the **precise purpose which specific commodities heretofore transported have been used**, and at the **precise points** to which they have heretofore been transported. The order, therefore, does violence to the foregoing principles enunciated or approved by this court.

In **Barrett Line, Inc., v. United States et al.**, 326 U. S. 179, the court had under consideration an order of the

[3] And compare, as well, **Russell Bros. Towing Case**, 250 I. C. C. 429; **Moran Towing and Transportation Co. Case**, 250 I. C. C. 541, 260 I. C. C. 269; **C. F. Harms—Application**, 260 I. C. C. 171.

Commission denying a contract water carrier's application for "grandfather rights" under sec. 309 (f) of the act, the applicant seeking authority to engage in the chartering of vessels and to transport general commodities, as well. The Commission denied the application in its entirety and the court, while indicating that with respect to general commodities its judgment might differ from that of the Commission (page 199), declined to interfere with that feature of the order due to paucity of evidence with respect to transportation of general commodities.

The major portion of the court's decision deals with the illegality of the Commission's action in declining a permit, authorizing the furnishing of vessels under charter, simply because it had not been established that transportation thereby performed was subject to regulation under the act.

In setting aside the Commission's order with respect to chartering, the court, at page 189, said:

> "Although it is true that no permit is required if only exempt commodities are carried in chartered vessels, appellant construes sec. 302 (e) to entitle it to a permit if on the crucial date it was engaged in bona fide chartering operations, without regard to whether the commodities actually carried were exempt or non-exempt. In this view the act is not concerned, so far as it relates to chartering, with the character of the commodity, but takes account only of the furnishing of the vessel; and the Commission, by requiring a showing as to the nature of the commodity, added a requirement not included or authorized by the statute."

While at that point not specifically approving the decisions of the Commission in such cases, the court (page 190) notes the reliance of applicant upon the Commission's decision in **C. F. Harms Company, Contract Carrier Application**, 261 I. C. C. 171; **Russell Brothers Towing Case**, 250 I. C. C. 429, and **Moran Towing and Transportation Co.**

Case, 250 I. C. C. 541, 260 I. C. C. 269, and extensive quotations from the **Moran** and **Russell Brothers** cases are included in the opinion at pages 192-193, with the following observation:

> "Notwithstanding the Commission's insistence that these cases are distinguishable, as resting upon different showings, it is difficult to accept that view if, as the **Moran** opinion indicates, the crucial fact to be shown in performance of service 'is performance of service' without regard to the nature of the cargo loaded and the vessels towed by it. The conclusion is even more difficult if, as the **Russell Brothers'** opinion states, 'to find that "grandfather" rights may be granted only to the extent that a showing is made as to the performance of regulated transportation requires the reading into the law of language which, in fact, is not there.'
>
> "**This statement applies equally to the comparable statutory provisions relating to contract carriers.** Cf. **C. F. Harms Company, Contract Carrier Application,** 250 I. C. C. 685, 260 I. C. C. 171."

Later in the opinion, in response to the Commission's argument that the court was not concerned with inconsistencies in Commission decisions, referring again to the **Harms, Moran Towing** and **Russell Brothers** cases, at page 197 the court observes that more than administrative inconsistency is involved, and **specifically approves the principles enunciated in these three Commission decisions by stating:**

> "With full respect for the dissenting judgment, we think the view eventually reached by the majority in those decisions **accords with the statutory purpose and provision.**"

Further, with respect to the policy to be adopted in disposing of water carrier applications, at page 198 the court said:

"The policy of maintaining that parity by adequate standards of proof is sound, although 'the act is remedial and to be construed liberally.' **McDonnell v. Thompson**, 205 U. S. 263, 266; **Crescent Express Lines v. United States**, 320 U. S. 401, 409. The policy, however, **may be defeated by too strict an application in particular cases, more especially it would seem in relation to water carriers whose operations, in contract carriage at any rate, are more generally irregular and spasmodic than in the case of other carriers.** The court has said, even in relation to the latter, 'the Commission may not **atomize** his prior service, **product by product**, so as to restrict the scope of his operations, where there is substantial evidence in addition to his holding out that he was in 'bona fide operation' as a 'common carrier' of a large group of commodities or of a whole class or classes of property. There might be substantial evidence of such an undertaking though the evidence as to any one article was not substantial.' **United States v. Carolina Carriers Corp.**, 315 U. S. 475, 483, 484." (Emphasis supplied.)

That due credence is to be given by the Commission to oral evidence of past operations, as well as to documentary evidence, is clearly indicated at page 159 of the **Barrett Line** opinion, supra.

If, as stated by the court, the statutory purposes and provisions are reflected by the majority opinions of the Commission in the **Russell Brothers, Harms** and **Moran Towing** cases, supra, then the order in the case at bar is arbitrary and unlawful in that it directly contravenes the principles enunciated in such decisions.

We turn now to specific questions presented growing out of the Commission's treatment of various material aspects of the application.

THE FURNISHING OF VESSELS.

Among other things, the application covered and the proof established that applicants, during the critical period, had been engaged in furnishing non-self-propelled vessels as well as self-propelled vessels on both bare-boat and fully-found bases, under "charter, lease, or other agreement," to persons other than carriers subject to the act, to be used by the persons to whom such vessels were furnished in the transportation of their own property. The order of the Commission permits the furnishing of non-self-propelled vessels, but precludes applicants from furnishing self-propelled vessels **on any basis.** Requested authority to furnish self-propelled vessels was denied upon the ground that applicants had theretofore not been engaged in a bona fide operation in "chartering" self-propelled vessels, in that the furnishing of self-propelled vessels had not met the Commission's definition of a "**demise**" promulgated by the Commission on June 24, 1948, in **Barrett Line, Inc., Contract Carrier Application,** 265 I. C. C. 361. Denial of applicant's request for authority to be permitted to continue to furnish self-propelled vessels presents not only a substantial question in construction of the act which has not heretofore been considered by this court, but presents, as well, additional substantial questions with respect to legality of the Commission's action in misconstruing and misapplying governing principles heretofore enunciated by this court.

The Commission found and it is conceded that applicants' status is that of a contract as distinguished from a common carrier. Section 302 (e) of the Act, U. S. Code, title 49, Sec. 902 (e), insofar as here pertinent, provides:

> "(e) The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than trans-

portation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

"The furnishing for compensation **(under a charter, lease, or other agreement)** of a vessel, to a person other than a carrier subject to this act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water.'" (Emphasis supplied.)

Without acknowledging accuracy of the Commission's findings with respect to applicants' past operations in the furnishing of vessels, nevertheless it is obvious therefrom that the furnishing of self-propelled vessels by applicants constituted a major portion of their operations. 265 I. C. C. 543, 545. One hundred sixty-eight instances of such furnishing are recognized by the Commission, and reference to Exhibits 33 and 39 discloses that each of these instances varied in duration from a few days to several months. Eighty-two of the instances are found to have been the furnishing of self-propelled vessels to the Memphis District Office of the United States Engineers, and the exhibits establish that these instances, in general, were those of the longest duration.

The Commission has chosen to consider this feature of the application as "chartering," which, within itself, is error, as we shall demonstrate.

In the first place, unless applicants are to be permitted to furnish vessels in the future as they have in the past no substantial parity between future operations and past bona fide operations can be maintained. The vessels have heretofore been furnished for any use to which the fur-

nishee might lawfully and safely put same. The agreements under which such vessels were furnished (Exhibit No. 40) were most certainly not towing agreements and, referring specifically to the furnishing of vessels to the United States Engineers, the future position of the Commission undoubtedly will be that the Engineers are not contractors and that the furnishing of self-propelled vessels to the Engineers does not come within the purview of the exemption allowing limited transportation of "contractors' equipment, etc." Thus, applicants will be effectively precluded from enjoying this substantial portion of their business, and parity cannot be maintained.

In the next place, as a basis for denying this feature of the application, the Commission has excluded from consideration all instances of self-propelled vessel furnishing to carriers subject to the act; this we concede to have been proper with respect to transportation performed subsequent to September 18, 1940, inasmuch for future purposes such service was excluded from the definition of "engaging in transportation" by a contract carrier [Sec. 302 (e)]. Prior to September 18, 1940, however, there was no act, and no carrier subject to the act, and it remains to be determined by this Court whether the Commission may ignore the bona fide furnishing of self-propelled vessels by one carrier to another carrier prior to the effective date of the act in determining whether the carrier during the critical period had held itself out as being willing to perform and did perform a bona fide service in the furnishing of self-propelled vessels. Such question is a substantial question.

In the next place, the Commission's denial of this portion of the application results from the following: It first erroneously concludes that the considered service performed by the applicants was a freighting service under the first sentence of Section 302 (e), rather than vessel

furnishing under the second sentence thereof (265 I. C. C., at pp. 153 et seq. and 544 et seq.); in the next place, the Commission erroneously apparently assumes that the only type of vessel furnishing anticipated by Congress was "**chartering**"; in the next place, the Commission erroneously finds that there can be no "charter" unless the transaction falls within the definition of a "**demise**" lately promulgated by the Commission, and here sought to be applied in an ex post facto manner; and, finally, the Commission erroneously concludes from the record in this case that applicants' operations have not, in fact, met the "**demise**" definition.

Still speaking with respect to the relations between applicants and the United States Engineers in the 82 instances of vessel furnishing, the **entire agreement** between the parties in each instance was reflected by a "purchase order," a representative instance being reflected by Exhibit No. 40.[4] There it is to be noted that the agreement does not provide for the towing or transportation of any commodity, but provides simply for the

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4 The typical agreement provides: "For rental of Diesel boat 'Mary Elizabeth,' for approximately 30 days beginning 16 August 1946 in accordance with the following specifications: (24 hour day) 30 days, $225.00 per 24 hour day. Payment will be computed starting from the day and hour of delivery of the towboat to the contracting officer and ending when the towboat is returned to the contractor at Memphis, Tennessee, or some other point equally agreeable to the contracting party on the basis of days and fractions thereof, the towboat to be in possession of the government. Time will be calculated to the nearest 1/4 hour for payment. The towboat shall be operated as directed by the contracting officer or his authorized representative, except that the master thereof shall not be expected to operate the towboat in any manner which would, in his opinion, endanger the towboat, the barges in tow, or the cargo. The contractor, or his representative with full authority to act for him with reference to the care and operation of the plant shall be on the plant at all times. The contractor shall furnish at his own expense all labor, appliances, equipment, materials, subsistence and supplies and shall bear all expenses, incidental to the efficient operation of the plant in connection with the work of towing under the contract. Contractor shall also bear all direct overhead and current expenses incidental to the operation, upkeep, and repair of the plant, he shall maintain the plant in good state of repair, shall arrange for a supply of renewal parts to be on hand when needed, and shall provide and maintain efficient crews. It is understood that the contractor releases the government and its officers and agents from all responsibility for damage such as are ordinarily covered by a fire and marine insurance."

furnishing of the self-propelled vessel for a number of days at an agreed price per 24-hour day or fraction thereof. Neither is it designated as a "charter."

This court has heretofore had occasion to consider and repudiate the strict and restrictive attitude of the Commission with respect to "grandfather" vessel furnishing rights of an applicant, as we pointed out, **supra.** See **Barrett Lines, Inc., v. United States et al., 326 U. S. 179.**

Following this court's decision in the **Barrett Line Case, supra,** the Commission reviewed the subject of chartering in **Barrett Lines, Inc.—Contract Carrier Application,** 265 I. C. C. 361, and reached the conclusion that, insofar as a contract carrier was concerned, under the Act no "grandfather" rights could be predicated upon proof of affreightment charters, that no "charter" could exist unless there was a "demise," and that there could be no "demise" supporting "grandfather" rights unless operations during the critical period **meant all of the criteria of the technical definition of "demise" promulgated by the Commission on June 24, 1948.**[5]

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[5] The pertinent portion of the decision of the Commission in **Barrett Line, Inc.—Contract Carrier Application,** 265 I. C. C. 361, appears at pp. 367-8, as follows:

"In view of the foregoing, the question arises, what kind of charter is referred to in the second sentence of the contract carrier definition: the demise charter, the affreightment charter, or both? It would seem unreasonable to say that the definition uses the term 'charter' in its broad admiralty law significance, i. e., as including contracts of affreightment as well as demise. The contract of affreightment is one for transportation to be performed by the vessel owner, and the transportation (if as a contract carrier) would in such case fall within the first sentence of the definition. In our view, therefore, the demise charter is the one referred to in the second sentence of the definition, and that type alone gives rise to 'grandfather' rights as a vessel furnisher.

"The above review seems to warrant the following conclusions:

"(1) The term 'charter' as used in the second sentence of section 302 (e) embraces demise charters, only, and does not embrace affreightment charters.

"(2) The question whether a particular charter is a demise or an affreightment charter is one of fact, to be determined upon consideration of all the pertinent circumstances and conditions.

"(3) If the charter covers a self-propelled vessel (or, as in this proceeding, towboats, or towboats and barges, operated as a unit),

Whether the Commission, as reflected by the footnote next above, has correctly construed the Congressional intent to be that "charter" as used in Section 302 (e) of the Act, U. S. Code, title 49, sec. 902 (e), does not include an affreightment charter, that a charter cannot exist in the absence of a "demise," and that the term "charter" is not to be considered to have the significance which it did under admiralty law when this act was passed are questions yet to be determined by this court.

A further substantial question is presented with respect to the furnishing of self-propelled vessels. Under sec. 309 (f) of the act, U. S. Code, title 49, sec. 909 (f), the **sole prerequisite** for the granting of a "grandfather" application duly filed, is that during the critical period the carrier **"was in bona fide operation as a contract carrier, and continued to so operate."** Without recitation of cases, this court has held that the foregoing section of the act should be liberally construed in order to assure substantial parity between future and past bona fide operations. The question is presented as to exactly what was the intention of Congress with respect to "grandfather" vessel **furnishing** rights. This question has heretofore neither been presented to nor determined by this court. In the **Barrett Line, Inc.**, case, supra, both before this court and the Commission, consideration was limited to **"chartering."** The question here presented is not answered

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the determination whether it is a demise or an affreightment turns on the question whether the owner yields or retains possession, command, and navigation of the vessel.

"In determining this question, the circumstances ordinarily of greater significance relate to the master and crew. If they are appointed and paid by the owner, the charter ordinarily will be construed as one of affreightment, on the theory that through his master and crew, the owner retains possession and control of the vessel, even though the directions on which the vessel shall proceed are given by the charter. **New Orleans-Belize S. S. Company v. United States, 239 U. S. 202, 206.** However, the fact that the master and the crew of the vessel are in the employ of the applicant, while of peculiar significance, is not in and of itself conclusive, and will yield to evidence of intention to surrender possession and control to the charterer."

thereby; it is directed to vessel furnishing under " . . . **lease or other agreement.**"

We refer now to sec. 302 (e) of the Act, U. S. Code, title 49, Sec. 902 (e), and respectfully present that thereby it is clearly established that it was the intention of Congress that to the full extent and in the manner that a carrier had been engaged in a bona fide operation in furnishing vessels prior to the critical date and during the critical period, in that manner and to that extent, it was entitled to continue to furnish such vessels upon application for such permit being duly filed, **regardless of by what name the vessel-furnishing had been called.**

As reflected by the section under consideration, the furnishing of vessels for compensation to be used as therein provided is the fundamental feature underlying the section: Parenthetically then, which we deem to be for added emphasis, the Congress said, "**(Under a charter, lease, or other agreement).**"

The conclusion is inescapable that Congress had in contemplation vessel furnishing other than that coming within any conceivable definition of "**charter**" when it specifically recognized that vessels could also be furnished under "**lease, or other agreement.**" And, we respectfully present, that it was in anticipation of and to forestall such technical and restrictive construction and application of the act by the Commission as that with which we are here confronted which prompted Congress to parenthetically spell out the vessel furnishing which it considered to be "engaging in transportation" within the meaning of its definition of "contract carrier by water."

As a matter of law, therefore, the Commission incorrectly and unlawfully construed and applied the act in denying to applicants a permit to furnish self-propelled vessels. The question presented is a substantial question.

The foregoing discussion has related to the furnishing of vessels fully-found. During the critical period applicants also held themselves out as being willing to furnish and did furnish self-propelled vessels on a bare-boat basis. Here again the Commission refused to consider evidence of furnishing of self-propelled vessels to persons which, since September 18, 1940, have been carriers subject to the act, even though the furnishing was performed prior to such date, and denied the permit on the ground that evidence of such furnishing to other persons was not sufficient to justify the granting of the permit. In so doing the Commission unlawfully failed to take into consideration the exigencies inherent in furnishing self-propelled vessels on a bare-boat basis to persons other than other carriers, the paucity of available clientele having a need for this type service, and the limited opportunity for applicants to do and perform that which they, in bona fide manner, did whenever there was a demand for such service. Overlooking one instance of the furnishing of a self-propelled vessel on a bare-boat basis to the West Kentucky Coal Company in December, 1940 (Tr. pp. 391 et seq.), the Commission, 265 I. C. C. 543, 545, without noting the duration of the instances of furnishing the vessels on a bare-boat basis, took cognizance of record furnishing thereof to persons other than carriers in May, 1929, April, 1935, December, 1936, and another in 1946. Considering the type service and furnishing involved, and the availability of clientele, we respectfully present that the conclusion that applicants had not held themselves out to perform and performed a bona fide operation in the furnishing of self-propelled vessels on a bare-boat basis was unlawful.

Furthermore, we respectfully present that even assuming arguendo that furnishing of self-propelled vessels will be permitted only under "charter," and that a "charter" must be a "demise" within the definition

thereof promulgated by the Commission, the action of the Commission in denying applicants a permit to furnish self-propelled vessels was arbitrary and unlawful, not based on findings of fact supported by the record, which conclusively establishes that for the duration of the alleged charters there was complete relinquishment of possession, command and navigation of the vessels. The Commission's finding is based on the quoted portion of Capt. Warner's testimony appearing at page 154 of 265 I. C. C. Reports. The quoted portion is removed from context—it ignores subsequent testimony of the witness establishing that what he meant in responding to the question, "You have the personal responsibility of the operation?" was that he was responsible for furnishing a capable pilot and crew and that alone; and that the only instructions given by him were that the vessel was not to be operated in such manner as to endanger either it or the crew (Tr. pp. 357 et seq.; 453 et seq.).

THE EXEMPTION.

A substantial question is presented, with respect to authority of the Commission under the act, to force a carrier to accept a temporary exemption in lieu of a permit to which it is entitled as a matter of presumptive right.[6]

In limine, we bluntly challenge the accuracy of all statements made in the Commission's reports, 265 I. C. C., at pages 150 and 551, to the effect that applicants have at any time sought an enlargement of the original exemption application. **The statements are simply without foundation in the record.** We challenge, further, the accuracy

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6 The exemption in final form appearing in the order of May 17, 1949, is as follows: "It is further ordered, That until further order of the Commission, transportation engaged in by applicants as a contract carrier by water of contractors' equipment, and materials and supplies incidental to and used with contractors' equipment, employed in construction work on the Mississippi River and its tributaries, and at points along such waterways, be, and it is hereby, exempted from the provisions of part III of the act."

of the statement at page 551 ascribing to applicants a theory under which the Commission is asked to "first set up a straw man then knock him down."

True it is that from the beginning, as well as at this time, applicants have insisted that such operations as will be permitted by the exemption, or would have been permitted under the several drafts thereof, will not permit the maintenance of substantial parity between future and past bona fide operations. It is equally true, however, that the insistence of applicants from the beginning has been and is that as a matter of presumptive right they are entitled to a permit under the "grandfather clause" based on evidence of bona fide operations, and that they cannot lawfully be deprived thereof by the issuance of a temporary exemption.

As heretofore pointed out the only application for exemption ever filed by applicants was filed on December 30, 1940, resulting in the order of May 9, 1942 (complete copy in evidence, partially reported 250 I. C. C. 803), finding the transportation by applicants "of contractors' equipment used in making levees or digging cutoffs, between points on the Mississippi River and its tributaries" to be exempt. This was based upon the report of the same date that such transportation required the use of special equipment. And it was based, as well, upon the report which stated:

> "The findings herein are **without prejudice** to whatever conclusions may be warranted on the **application for a permit** which applicants filed subsequent to this application for exemption." (Emphasis supplied.)

It is clear from the report and order of May 17, 1949 (265 I. C. C. 543), that the Commission, in the face of its foregoing statement, has used the exemption, progressively enlarged at its own behest, prejudicially to applicants and

as the only basis for denying to them the permit to which they are entitled under the act.

The "grandfather clause" upon which applicants rely, heretofore quoted in full, is section 309 (f) of the act, U. S. Code, title 49, sec. 909 (f). The section of the act under which the alleged exemption is granted is section 303 (e), U. S. Code, title 49, sec. 903 (e), which, in pertinent portion, is as follows:

> "It is hereby declared to be the policy of Congress to exclude from the provisions of this part, in addition to the transportation otherwise excluded under this section, transportation by **contract carriers** by water which, by reason of the **inherent nature** of the commodities transported, their **requirement of special equipment**, or their shipment in bulk, is not actually and substantially competitive with transportation by any **common carrier** subject to this part or Part I or Part II. **Upon application of a carrier**, made in such manner and form as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this part such of the transportation engaged in by such carrier as it find necessary to carry out the policy above declared." (Emphasis supplied.)

The Commission has arbitrarily and unlawfully construed applicants' argument that the exemption at no time has been sufficiently broad to enable the performance of transportation heretofore performed, such arguments being presented in opposition to the position in which interveners were trying to place applicants before the Commission, as being application for enlargement thereof. **At no place in the record will it appear that applicants requested a reopening of the order of May 9, 1942** (reported in part 250 I. C. C. 803); **at no place in the record**

will be found a request for enlargement of the exemption, and at no point in the record will be found a sanction by applicants of an exemption in lieu of a permit which would authorize continuance of operations carried on prior to and since the statutory date, and to which they are entitled as a matter of presumptive right.

Obviously under section 303 (e) of the act, supra, the Commission can issue an exemption only **upon application of a contract carrier.** Had the Congress intended for the Commission to issue such exemption upon its own motion it would have specifically so provided, as was provided with respect to furnishing of vessels under section 302 (e), and exempting carriers from the requirements of sec. 306 (e), U. S. Code, title 49, secs. 902 (e), 906 (e).

Applicants in this proceeding find themselves, as did the carrier in **Barrett Line, Inc., v. United States et al.,** 326 U. S. 179, maneuvered into a position by the Commission where they are "caught between the upper and nether millstones, so to speak . . . " (page 187). They cannot exist without performing the transportation service heretofore performed, regardless of by what name it is called, and regardless of whether under an exemption or a permit, but do present that it is arbitrary and unlawful for the Commission to seek to force them to abandon their claim to a presumptive right granted by Congress, and supported by substantial evidence.

It would be impractical for applicants to say that they object to any portion of their service being relieved from regulation by the Commission—on the other hand the act permits an exemption solely to a contract carrier, as defined by the act—and a contract carrier is precluded from operating without a permit.

Applicant's strenuous insistence upon a permit rather than or in addition to an exemption is not a matter of

academic interest alone nor based upon technical consideration. Substantial questions and material rights not considered by the Commission are involved.

In the first place a contract carrier's permit is a **property right** of value, which can be sold and transferred under the supervision of the Commission, with specific provision therefore made by the act (see sec. 312, U. S. Code, title 49, sec. 912). No provision whatsoever is made by the act for the sale or transfer of an exemption. Inclusio unius est exclusio alterius.

In the next place, a permit held and exercised by a contract carrier, to the same extent as a certificate held and exercised by a common carrier, entitles the carrier to protection against encroachment by other carriers not holding a certificate or permit, in the absence of a showing by a proposed new operation that the public convenience and necessity require such operation. **No such protection is afforded the holder of an exemption.** The exemption is granted upon the basis that the transportation performed "is not actually and substantially competitive with transportation by any **common carrier** subject to this part (part III) or part I or part II." It results, therefore, that any other contract carrier, upon application to the Commission, would be entitled to have declared exempt the same type transportation performed by applicant, inasmuch as no permit or certificate of public convenience and necessity would be required, and there is nothing in the act requiring proof of bona fide past operation or of public convenience and necessity. The inevitable ultimate result of the report and order of the Commission in this case and the effect thereof is obvious: Applicant's struggles for more than twenty-five years in contributing to the building of a national transportation system would be nullified, the presumed protection granted upon enactment of the act by inclusion therein of the "grandfather clause"

and preclusion of new operations without proof of public convenience and necessity would in reality become nonexistent, and applicants would be confronted with additional competition to them at will simply upon proof that special equipment was required and the proposed new operation would not be competitive with common carriers, inasmuch as section 303 (e) makes no mention of competition with contract carriers. We present that such was not the intent of Congress in enacting either part III of the Interstate Commerce Act or in enunciating the National Transportation Policy (U. S. Code, title 49, notes preceding secs. 1, 301, 901, and 1001).

As we will hereinafter demonstrate in more detail, during the critical period applicants held themselves out as being willing to transport and did transport a general class of commodities throughout application territory. Although by no means does the Commission's report and order include all commodities transported, even therefrom it is seen that the following commodities were included (265 I. C. C. 543, 549): cattle, dredging equipment, rice, logs, lumber, piling, gasoline and other petroleum products, steel and steel bars, machinery, derricks, dredges, household furniture, mules, drag lines, tractors, bulldozers, camp equipment, trucks, repair parts, houses, tools, greases, oils, air compressors, welding machines, greasing equipment and stoves. The act authorizes the exemption **only** with respect to commodities the transportation of which **requires special equipment** [sec. 303 (e)], and such was the Commission's stated basis for granting the exemption (265 I. C. C. 543, 551). On the other hand, the only special equipment found to have been owned by applicants and the only special equipment found to have been used by applicants was **one barge**, and the only commodity requiring the use of special equipment was **large heavy machinery**. In this connection the Commission said, 265 I. C. C. 147, 150:

"For the purpose of handling large heavy equipment, applicants own a large flush-deck steel barge 60 feet wide with a specially re-enforced deck."

It is obvious from an examination of the foregoing list of commodities found to have been transported and which the Commission has included in the generic term "contractor's equipment, etc.," that the transportation of by far the greater portion thereof can be performed without special equipment being required, and it is only logical to assume that the Commission in the construction of its report and order will endeavor to do that unless special equipment is required and used in future operations the exemption will not permit such commodities to be transported. Thereby applicants would be deprived of an additional substantial portion of their business in that a permit to perform such transportation has been unlawfully denied.

The exemption, furthermore, is arbitrary and unlawfully restrictive on the face thereof territorially-wise in that it will not permit performance of transportation on the Gulf Intracoastal Waterway when, at 265 I. C. C. 550, it is recognized that contractor's equipment, materials and supplies were transported over such Waterway by applicants prior to 1940, as well as since 1940, evidence of such transportation having been excluded from consideration in determining freighting territory upon the basis that it was covered by the exemption granted herein.

The exemption is further arbitrary and unlawfully restrictive in that it is susceptible to the interpretation that commodities transported thereunder must be **owned by contractors**, and that transportation is authorized of commodities to be used solely **for the purpose of construction work** on the Mississippi River and its tributaries and at points along such waterways. Thus, transportation of the same commodities for a person other than a contractor

would be precluded; transportation of included commodities for use at a site other than a point on the involved waterways would not be permitted; neither would the movement of the named commodities to concentration yards or for rebuilding and repair be included. The record amply establishes that all such types transportation have been regularly and customarily performed and, even upon the basis of the evidence adduced at the first hearing in 1946, the Commission said:

> "The contractors for which applicants handle equipment engage primarily in earth-moving, but in recent years this has included airport construction, grading for powder and defense plants, construction of dams, patch-work on levees, digging a canal and a harbor, sloping banks at an oil terminal, and building a dry-dock, as well as building levees and digging cut-offs" (265 I. C. C. 147, 150).

We respectfully present that the arbitrary and unlawful purpose of granting to applicants a highly restricted exemption in lieu of a permit to which they are entitled as a matter of right (this being done at the behest of intervening competitive water carriers) was to enable the Commission to **exclude from consideration all transportation now belatedly declared by the Commission to be exempt** in determining the extent of bona fide operations conducted by applicants during the critical period, and, as appears upon the face of the report upon which the Commission's order is based, **that is exactly what has been done** (265 I. C. C. 543).

COMMODITY DESCRIPTION.

Upon the basis of the evidence adduced on the first hearing of the contract carrier application the Commission issued its first report and order, 265 I. C. C. 147, granting

applicants a permit to transport "forest products" and the exemption heretofore discussed with respect to contractors' equipment; subsequently, on rehearing, proof was adduced with respect to transportation of a wide range of commodities, with no effect except that the Commission arbitrarily and unlawfully gathered them all in under the generic term "contractors' equipment, and materials and supplies incidental to and used with Contractors' equipment," and included them in the exemption.

As we have heretofore established, during the critical period applicants held themselves out as being willing to perform and did perform a bona fide transportation service, handling any and all commodities tendered, regardless of by whom owned, for what use they were to be put, or where they were to be used.

In refusing to grant to applicants a permit to transport commodities generally the Commission has acted arbitrarily and unlawfully, has frozen applicants' future operations into even less than the precise pattern of its past operations, failed to take into consideration the type transportation service involved, and misconstrued and misapplied the provisions of the act as well as the decisions of this court. In so doing it has excluded from consideration all transportation performed which was in 1940 declared in the future to be exempt from the provisions of the act, or which by subsequent administrative regulation or order has been declared exempt from regulation. Further, all oral evidence of transportation has been ignored, and the Commission's order based solely and exclusively on documentary evidence of "regulated" transportation. To limit and restrict the commodities which applicants may transport to "forest products" and "contractors' equipment, etc.," does violence to the act and prior decisions of the Commission based upon principles sanctioned by this court.

Referring to the Commission's last report, 265 I. C. C., at page 549, the Commission finds that from 1932 to April, 1948, 587 barge loads of **freight** were transported, consisting of 14 different enumerated commodities, plus a large number of other commodities included under the term "contractors' equipment." At no place in the report, however, does the Commission refer to any of the freight established by oral testimony to have been transported, nor to stipulations of record with respect to additional transportation. For example, at page 147 of the typewritten transcript it was stipulated that saw-mill equipment and dummy railroads had been transported—**not mentioned by the Commission**; at pages 151 et seq., of the transcript it is established that applicants had transported mixed concrete in slabs, fabric, re-enforcement steel, sand and gravel, and other miscellaneous materials used in making concrete, including cement in sacks; further, at pages 161 et seq., of the transcript it is established that applicants had transported sand, gravel, roofing gravel, torpedo sand, standard mixed gravel, bird's-eye gravel and class 1 gravel; and at pages 164 et seq. it is established that applicant had transported coal and cement in bulk, **none of which transportation was considered by the Commission,** which arbitrarily held, even with respect to the transportation considered by it:

> "While the above indicates a wide range of commodities, it is to be noted that where such commodities were transported they were handled as part of a movement of contractors' equipment."

Unless a different standard with respect to type and quantum of proof applies to applications for permits by contract carriers as distinguished from applications for certificates by common carriers, prior decisions establish that in this case the Commission has acted arbitrarily and unlawfully. Certainly no such distinction is sanctioned by the act. [Compare secs. 309 (a) and 309 (f).]

The proper attitude to be adopted by the Commission with respect to water carrier applications, and that which has heretofore been adopted, with the sanction of this court (Barrett Line, Inc., v. United States, 326 U. S. 179, 197) is expressed by the Commission in **Moran Towing and Transportation Company, Inc.—Application,** 260 I. C. C. 269, at page 273, as follows:

> "In **McClain Carolina Line, Inc., Common Carrier Application,** 250 I. C. C. 521, we said at page 522: 'Consideration should also be given to the scope of the operation in which the applicant's line was organized to engage, the extent to which it held itself out to transport traffic within such territory, and its ability to perform such transportation upon demand.'"

And further, on the same page, the Commission said:

> "In our administration of the act we have adopted a liberal attitude with respect to the granting of operating authorities to water carriers holding their services out to the general public, because the general characteristics of water carriers are such that ordinarily they do not handle as wide a variety of commodities or serve as many points as the rail or motor carriers."

In an unpublished decision by Division 4 in No. W-26, **Clifton Towing Company,** released on September 26, 1944, approved by the entire Commission on petition for reconsideration, 260 I. C. C. 802, 803, being an application for permission to transport commodities generally, it was found that during the critical period applicant had transported only forest products, coal and paving blocks. In granting authority to transport commodities generally the Commission said:

> "Arrow Transportation Company excepts to the proposed report insofar as applicant is granted au-

thority to operate as a common carrier of commodities general. It urges that, because applicant has engaged only in the transportation of forest products as a contract carrier for many years, it should be so restricted. Although applicants have engaged principally in the transportation of forest products, it has not restricted its service to the handling of these commodities. Coal was handled in 1940 and each year since and paving blocks were handled in 1940 . . . We conclude that applicant's undertaking has been to transport commodities generally . . . to the extent of its available facilities."

In **Ohio River Company—Application**, 260 I. C. C. 501, applicant was seeking authority to operate as a common carrier by water in the transportation of commodities generally and, as well, to perform a general towage service. The application was granted.

The authority to transport commodities generally was based upon the finding of the Commission at page 505, as follows:

"The traffic handled over these waterways has been substantial in volume, and it has consisted principally of dry and liquid commodities in bulk which, if transported in the future under conditions outlined in sec. 303 (b) and (d) would be exempt from regulation. However, non-exempt transportation during the critical period included such commodities as cement, pig iron, ingot molds, asphalt, a crawler-type crane, a lock gate, machinery, construction equipment, and contractors' equipment."

Further, at page 507, the Commission said:

"The list of commodities handled includes machinery, construction equipment, and contractors'

equipment. Each such description is sufficiently broad to include many different commodities. Therefore, the transportation performed may have been of a character which if continued would be subject to regulation to a far greater extent than is indicated by the small percentage of non-exempt traffic upon which protestants rely. We cannot assume because some traffic handled, whether in dry or liquid form, is a commodity in bulk, that it actually has been or in the future will be transported under the conditions outlined in the exemption provisions."

The foregoing statement was made after a finding that 90% of the tonnage handled by applicant in that case was coal transported in bulk, and that of the remaining 10% less than 1% was of non-bulk commodities.

After reiterating its decision in **Russell Brothers Towing Company, Inc.**—Common Carrier Application, 250 I. C. C. 429, that in determining a carrier's status and the scope of its operations during the "grandfather" period, its entire operation should be considered, and not merely that part which Congress has seen fit to make subject to regulation, in the **Ohio River Company case**, 260 I. C. C. at page 508, the Commission said:

"While applicant has transported relatively few of the innumerable products embraced in the classification under the heading 'Iron and Steel Articles', the list of such products handled is sufficiently diversified to preclude a limitation which would prevent the transportation of other articles within the same class. A similar situation exists on other portions of the route with respect to that class of traffic and also articles described as 'machinery', 'contractors' equipment' and 'construction equipment', each of which is sufficiently broad to embrace many different commod-

ities. We will, therefore, follow our usual practice under part III of the act and authorize the transportation of commodities generally. Applicant also will be authorized to engage in general towage." [7]

TERRITORIAL SCOPE OF OPERATING AUTHORITY.

The observations heretofore made with respect to "pulverization, atomization, and molecularization" in dealing with types of operations performed and commodities transported apply with even greater force to the Commission's treatment of the evidence with respect to territorial scope of applicant's bona fide operation.

It is obvious from the report, statements to the contrary therein notwithstanding, that due consideration has not been given to applicant's over-all operation, and the unrestricted holding out to perform towing, freighting, and vessel furnishing services throughout application territory, as well as the fact that, when the operation is viewed as a whole, substantial service was performed throughout application territory during the critical period.

In determining territorial scope of towage rights evidence of freighting operations has been excluded, and vice versa; and, in every instance, the Commission has refused to consider oral evidence of any transportation, or any evidence of transportation, regardless of when performed, which is now considered exempt by virtue of the act, general or special order of the Commission. Thus, no consideration has been given to the transportation of commodities in bulk, towage of vessels for other water carriers subject to part III of the act, towage of floating objects, or transportation of "contractors' equipment, and mate-

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[7] And see **McLain Carolina Line, Inc.**, common carrier application, 250 I. C. C. 521; **Tennessee Valley Sand and Gravel Company**, common-contract carrier application, 250 I. C. C. 599; **Moran Towing and Transportation Company, Inc.**, applications, 260 I. C. C. 269.

rials and supplies incidental to and used with contractors' equipment."

As we have heretofore pointed out, applicant's operation was a combined operation, not departmentalized or segregated either as to type service performed, commodity transported, territory involved or time. In determining, therefore, the territory in which applicant has been engaged in bona fide operation evidence of all transportation performed in towage or freighting should be given equal weight. As the entire Commission said in **Ohio River Company Application,** 260 I. C. C. 501, 506:

> "While towage and freighting are distinct types of service, in a combined operation each type is entitled to equal weight as evidence of bona fide operation as a common carrier."

Further, the entire Commission in **Zigler Company Application,** 265 I. C. C. 404, 406, said:

> "Although some of the foregoing transportation was performed by applicant for other water carriers, or was intrastate in character, nevertheless these services evidence applicant's ability and willingness to perform subject water carrier service in the territory claimed."

And in **Russell Brothers Towing Company, Inc., Application,** 250 I. C. C. 429, 433, the entire Commission said:

> "In determining a carrier's status and the scope of its operations during the 'grandfather' period, its entire operation should be considered, and not merely that part which the Congress has seen fit to make subject to regulation. To find that 'grandfather' rights may be granted only to the extent that a showing is made as to the performance of regulated transportation requires the reading into the law of language which, in fact, is not there."

The foregoing principles correctly interpret the act and effectuate the National Transportation Policy enunciated by Congress (54 Stat. L. 899; U. S. Code, title 49, notes preceding secs. 1, 301, 901, 1001). They have heretofore been approved by this court, either directly or by necessary implication. **Barrett Line, Inc., v. United States et al.,** 326 U. S. 179; **United States v. Carolina Freight Carriers Corporation,** 315 U. S. 475.

Failure and refusal of the Commission to apply the foregoing principles in this case and the application of principles contra thereto results in an order which arbitrarily and unlawfully restricts applicant's operating authority to the extent that substantial parity between future and past bona fide operations may not be maintained.

CONCLUSION.

We respectfully present, therefore, that the order of the Commission is arbitrary and unlawful, and should have been set aside by the court below, in that it erroneously construes sec. 302 (e) of the act by holding that only "chartering" of vessels under a "demised" as defined by the Commission constitutes furnishing of vessels for compensation within the meaning of the section, and in refusing to hold that under the "grandfather clause" a carrier is entitled to a permit to continue to furnish vessels under a "lease, or other agreement" upon proof of bona fide operation in so doing during the critical period; and in that evidence of regulated transportation alone is considered in determining the bona fide operation in which applicant was engaged within the meaning of sec. 309 (f); and in that the Commission has exceeded its authority in holding that a temporary exemption may be granted under sec. 303 (e) in lieu of a permit to which a carrier is entitled as a matter of presumptive right under sec. 309 (f); and in that the Commission has exceeded its authority in denying

permission to transport a general class of commodities and in combining the wide range of commodities heretofore transported under the generic terms "contractors' equipment, and materials and supplies incidental to and used with contractors' equipment," with further limitation as to use of such commodities and places where they are to be used; and in that the report of the Commission "pulverizes, atomizes and molecularizes" applicant's operations, and the order based thereon freezes future operations into even less than the precise pattern of past operations and precludes the maintenance of substantial parity between future operations and past bona fide operations.

Substantial questions being involved, we respectfully present that the court should assume jurisdiction, and that upon the final hearing the decree of the court below should be reversed, the order of the Commission set aside and the case remanded with appropriate directions.

Respectfully submitted,

JAMES W. WRAPE,
GLENN M. ELLIOTT,
1804 Sterick Building,
Memphis, Tennessee,
Attorneys for Appellants.

Of Counsel:

WRAPE and HERNLY,
Attorneys at Law,
1804 Sterick Building,
Memphis, Tennessee,
1624 Eye Street, N. W.,
Washington, D. C.